87-1684

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON AND JASON MANNING WESSON, MINORS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

(1) Whether the Supreme Court of Mississippi erred in failing to apply this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987), which held that the Employee Retirement Income Security Act of 1974 bars state common law punitive damages claims based upon alleged improper processing of claims for benefits under an employee benefit plan.

(2) Whether the $1,500,000 punitive damage award against MONY on an insurance claim of $87,136 violates the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States because it is disproportionate to actual damages and vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous allegedly criminal business activities.

(3) Whether the Due Process Clause of the Fourteenth Amendment prohibits the imposition of punitive damages in civil actions absent some or all of the same procedural rights as are enjoyed by defendants in criminal cases.

PARTIES TO THE PROCEEDING

The Mutual Life Insurance Company of New York*

Estate of Ray Lamar Wesson, M.D., Deceased, by Emogene Hall, Administratrix and as Guardian of Ray Lamar Wesson, Jr., Allison Lynn Wesson, Dave Newton Wesson and Jason Manning Wesson **

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* Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of Petitioner: The Mutual Life Insurance Company of New York has a controlling interest in, but does not wholly own, MONY Life Insurance Company of Canada and Institutional Assets, Limited.

** Additional Appellees before the Supreme Court of Mississippi were Corporate Planning, Ltd. and W. A. Wimberly. Petitioner satisfied the judgment against it in favor of those parties, in the amount of $350,000, on December 14, 1987.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

The Petitioner, The Mutual Life Insurance Company of New York, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered on January 13, 1988.

OPINION BELOW

The November 12, 1987 opinion of the Supreme Court of Mississippi, 517 So. 2d 521, is in the Appendix at 1a. The judgment of the trial court is in the Appendix at 40a.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Mississippi was entered on January 13, 1988 after a Petition for Rehearing by Respondent was denied. Appendix at 1a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3) (1966).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. This case involves §§ 2, 3, 502, 503 and 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, 1002, 1132, 1133 and 1144 (1982), the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1982) and 29 C.F.R. § 2560.503-1 (1985) promulgated under ERISA § 503, set forth in the Appendix at 42a to 61a.

2. The Supremacy Clause, Art. VI, cl. 2 of the Constitution, which provides in pertinent part, that:

> "[t]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."

3. The Excessive Fines Clause of the Eighth Amendment of the Constitution which provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

4. The Due Process Clause of the Fourteenth Amendment of the Constitution which provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

In early 1974, Dr. Ray Lamar Wesson ("Wesson") and his partner organized the Surgical Clinic of Biloxi, P.A. (the "Clinic"), which established an employee pension benefit plan (the "Plan"). The Plan (appendix ("app.") at 74a) was amended in 1976 to conform to the Employee Retirement Income Security Act of 1974

("ERISA"). App. at 67a.[1] In 1974, the Plan purchased from The Mutual Life Insurance Company of New York ("MONY") a whole-life, tax-qualified pension trust policy on the life of Wesson for a face amount of $87,136. *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d 521, 524 (Miss. 1987), app. at 2a-3a.

In his application for the policy, Wesson requested an Automatic Premium Loan provision ("APL"), which provided that if there was sufficient cash value to pay a premium not otherwise paid, the premium would be paid by automatic loan. *Id.* at 524-25, app. at 3a-4a.

As Andrew Watson, a MONY pension law expert testified, in order to avoid disqualification of corporate retirement plans by the Internal Revenue Service, MONY did not permit an APL in pension trust policies. App. at 71a. *See also* Rev. Rul. 329, 1971-2 C.B. 204; I.R.S. Pub. 778 (2-72), Part 5(q). *See generally* I.R.C. § 401 (a)(4) (1986); Treas. Reg. § 1.401-4(a)(1)(i) (1984); Treas. Reg. § 1.401-1(b)(3) (1976). MONY, therefore, coded all tax-qualified policies no APL to prevent automatic premium loans.

The Wesson policy lapsed on March 3, 1980, when the premium due February 1, 1980 had not been paid and the grace period had expired. Wesson died on March 14, 1980. Since MONY relied on its computer records, it believed that the Wesson policy did not contain an operative APL, and paid Respondent the reduced paid-up insurance under the policy ($3,687). *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d at 526, app. at 7a. In November, 1982, shortly after answering the complaint and promptly after discovery of the existence of an APL, MONY offered to pay the full death benefit, plus interest. The APL was operative because

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[1] The 1974 Plan and the revised 1976 Plan were both marked for identification at trial, but were not admitted into evidence. App. at 62a-64a.

an endorsement to the policy relied upon by MONY to negate the APL in the policy was determined in 1976 to be ineffective. *Id.* at 525, app. at 5a. That offer was refused, and the funds were paid into court in December, 1982. MONY failed to discover the APL before that date because its employees negligently relied on the computer records and did not review the actual policy file.

The jury awarded actual damages of $87,136 (the face amount of the policy). Lacking any guidelines governing the imposition or amount of punitive damages, the jury also awarded punitive damages of $8,000,000 based upon MONY's purported "bad faith" in initially declining to pay the face amount of the policy.

On November 13, 1986, MONY asserted its constitutional challenge to the excessiveness of the punitive damage award by motion to amend the assignment of errors to the Supreme Court of Mississippi. App. at 116a. MONY asserted that the punitive damage award contravened the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States. That motion was denied at oral argument as the constitutional defense had not been presented to the trial court.

On April 6, 1987, while this case was pending before the Supreme Court of Mississippi, this Court decided *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987). Both *Pilot Life* and this case involve a claim for benefits under an "employee benefit plan," which ERISA § 2, 29 U.S.C. §§ 1001 *et seq.*, defines as "an employee welfare benefit plan [as in *Pilot Life*] or an employee pension benefit plan [as here] . . . ." *See* ERISA § 3(3); 29 U.S.C. § 1002(3) (1982). MONY advised the Mississippi Supreme Court of this Court's decision in *Pilot Life* by letter brief dated May 22, 1987. App. at 120a.

On November 12, 1987, the Mississippi Supreme Court affirmed on the condition of a remittitur in the amount

of $6,500,000 on the punitive damage award of $8,000,000. *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d at 533, app. at 22a. In a footnote, the court stated that it did not address the ERISA preemption issue as it was "not raised in the lower court or in the appellate briefs and argument." The Mississippi court simply noted that *Pilot Life* was decided after the appeal was submitted to it. *Id.* at 529, n.3, app. at 13a. In dissent, however, Justice James L. Robertson stated that, "[a]s the plan under which the present action has been brought lies well within ERISA's coverage," Respondent's state common law claim for punitive damages was preempted by ERISA. *Id.* at 538 (Robertson, J., dissenting), app. at 34a. The court did not address MONY's constitutional challenge under the Excessive Fines Clause of the Eighth Amendment of the Constitution.

REASONS FOR GRANTING THE WRIT

I. THE FAILURE OF THE SUPREME COURT OF MISSISSIPPI TO APPLY *PILOT LIFE* IS ERROR REQUIRING REVERSAL BY THIS COURT

This is an ERISA case. ERISA defines an "employee benefit plan" to be:

> an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

ERISA § 3(3); 29 U.S.C. § 1002(3) (1982).

"Employee pension benefit plan" and "pension plan" are defined as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA § 3(2)(A); 29 U.S.C. § 1002(2)(A)(1982).

The Wesson policy was purchased as part of an employee pension benefit plan. App. at 65a-66a. The Plan was established in February, 1974, prior to ERISA's effective date, to secure the benefits available to tax-qualified pension plans. App. at 69a. A Resolution of the Directors of the Clinic dated February 1, 1976 provided that the Plan:

> is hereby amended . . . by way of substitution of a new plan which shall conform to the Pension Reform Act of 1974.

App. at 73a. The Plan, as amended, specifically provided that:

> [t]he Plan and Trust are intended to meet the requirements of Sections 401(a) and 501(a) of the Internal Revenue Code of 1954, as amended by the Employee Retirement Income Security Act of 1974.

App. at 74a.

At trial, Matt Ballew, a partner in Corporate Planning, Ltd. (Wesson's insurance agent), testified that:

> [w]hen I was practicing law, I brought their retirement plan in compliance with ERISA in 1976.

App. at 67a. Indeed, Justice Robertson, in dissent, expressly found the "plan [to be] well within ERISA's coverage," *Mutual Life Insurance Co. of New York v. Estate of Wesson*, 517 So. 2d at 538, app. at 34a, and

the majority apparently assumed that the Plan was an ERISA plan. *Id.* at 524, app. at 2a.

Although ERISA provides that the statute does not apply "with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975," ERISA § 514 (b)(1); 29 U.S.C. § 1144 (b)(1) (1982), it is apparent from the decision below that the Mississippi Supreme Court recognized that Respondent's cause of action for improper denial of the claim (the act) was based upon MONY's reliance, in June, 1980, upon the computer records which showed that the Wesson policy did not contain an operative APL. *Id.* at 526-27, app. at 8a.

On April 6, 1987, before the Mississippi Supreme Court rendered its decision, this Court decided *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987). This Court unanimously held that ERISA preempts state common law actions for improper processing of benefit claims under employee benefit plans. This Court also held in *Pilot Life* that ERISA:

> set[s] forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. at 1556.

Prior to *Pilot Life*, there was an unresolved question whether an implied cause of action for punitive damages could be found anywhere in ERISA. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 148 (1985), this Court held that no such cause of action could

be implied in ERISA § 409 for the "improper or untimely processing of benefit claims" by a fiduciary. The Court reasoned that given the legislative history, it was no accident that the remedy of extra-contractual damages was not expressly provided for in ERISA. *Id.* at 146. This Court stated that it was "reluctant to 'fine tune' an enforcement scheme crafted with such evident care as the one in ERISA." *Id.* at 147.[2]

Pilot Life is also significant, not only for the precedential nature of the rule of law which it states, but because like the instant case, it involved the application of Mississippi common law claims for punitive damages. *Pilot Life* specifically held that the Mississippi law of bad faith, relied upon by the Mississippi Supreme Court to support the award of punitive damages, does not "regulate insurance" under ERISA's saving clause and is, therefore, preempted. *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. at 1555.

In view of the dispositive nature of *Pilot Life*, MONY advised the Mississippi Supreme Court of this Court's decision. In a footnote to the majority's opinion, the court chose not to apply *Pilot Life*, as *Pilot Life* was decided after this case was "submitted." *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d at 529, n.3, app. at 13a. Justice Robertson, in dissent, recognized the preemptive effect of ERISA and voted to reverse stating that ERISA:

> preempted state common law actions charging an insurer's improper processing of an employee's claim for benefits under an insured employee benefit plan. As

[2] It is noteworthy that while three justices joined Justice Brennan in a concurring opinion in *Russell* that expressed reservations with respect to the broadly written nature of the majority opinion concerning extra-contractual damages, and seemed to suggest that perhaps such damages could be available as a remedy in cases falling under other sections of ERISA, the decision in *Pilot Life* was unanimous.

> the plan under which the present action has been brought lies well within ERISA's coverage, we are bound to stay our hand. *See* U.S. Const. Art. VI, Section 2 (1787) . . . . ERISA provides nothing less than that the courts of this state have no authority over cases of this sort.

Id. at 538-39 (Robertson, J., dissenting), app. at 34a-35a.

The Mississippi court's rationale for its failure to apply this Court's holding in *Pilot Life* contradicts prior holdings of this Court. Where, as here, a judicial decision rendered subsequent to trial creates an issue, raised for the first time on appeal, that issue should be judicially examined. In exercising its appellate jurisdiction, the Mississippi court was constrained to consider any change of law which supervened since the judgment was entered. *Bell v. Maryland*, 378 U.S. 226, 238-39 (1964). The governing rule announced by Mr. Chief Justice Marshall in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), established that, if subsequent to judgment and before the decision by an appellate court a law intervenes and changes the rule which governs, the law must be obeyed. The foundation for the rule is the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Cort v. Ash*, 422 U.S. 66, 77 (1975), *quoting Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974).

This Court has specifically held that a judgment will be vacated on appeal where an intervening judicial decision changes the applicable rule of law. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). *Pilot Life* changed the governing law in this case. Claims under Mississippi's common law of "bad faith" for the improper processing of a claim for benefits under an ERISA-regulated plan were held to be preempted by fed-

eral law. The Mississippi court was constrained to apply the law as it existed at the time of its decision. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941).

MONY properly and timely raised the issue of the supervening effect of *Pilot Life* by letter brief, six months before the Mississippi Supreme Court rendered its decision. App. at 120a. Prior to *Pilot Life* it had not been established that ERISA preempted claims of the kind at issue in this case. *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1548 n. (1987) (Brennan, J., concurring, joined by Marshall, J.). Accordingly, MONY did not waive its right to assert ERISA-preemption by not raising it at trial. In any event, Respondent can show no prejudice as the death benefit had been paid into court and the only remaining issue was Respondent's claim for punitive damages.

The Mississippi Supreme Court's decision not to reach the ERISA issue is tantamount to ignoring a valid subject matter jurisdiction objection. As Justice Robertson noted in his dissent, the courts have no authority or jurisdiction to award punitive damages for the improper processing of a claim for benefits under an employee pension benefit plan. *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d at 539 (Robertson, J., dissenting), app. at 35a. It is axiomatic that, absent a jurisdictional predicate, a court is without power to grant the relief requested.

If the decision of the Supreme Court of Mississippi is permitted to stand, it will have a profound adverse effect on the application of supervening United States Supreme Court decisions. The Mississippi Supreme Court's refusal to apply *Pilot Life* strikes at the very core of this Court's constitutional mandate to determine, and insure compliance with, the law of the land. Moreover, the uniformity of law that ERISA was so carefully designed to provide will quickly be eroded as each state

becomes free to apply its own common law to all cases on appeal where ERISA preemption issues were not raised at the trial court level, thereby creating inconsistent remedies, such as punitive damages, contrary to the Congressional intent to "establish[] benefit plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Because it permits the practices of the states to assume a prominence equal, if not superior, to ERISA with respect to the handling of benefit claims, the decision below achieves precisely the result Congress carefully sought to avoid when it enacted ERISA.

II. THE FEDERAL CONSTITUTIONAL QUESTIONS WERE PROPERLY PRESENTED

MONY first challenged the excessiveness of the punitive damage award in its post-trial motion. App. at 126a. MONY raised the issue of the excessiveness of the jury's verdict at the earliest opportunity, *see Chambers v. Mississippi*, 410 U.S. 284, 290-91 n.3 (1973), and renewed it on appeal to the Supreme Court of Mississippi.

MONY expressly invoked the Excessive Fines Clause of the Eighth Amendment in support of its challenge to the punitive damage award on appeal by a motion to amend its assignment of errors.[3] App. at 116a. MONY's motion was denied at oral argument on the ground that MONY did not present its Excessive Fines challenge to the trial court in express constitutional terms. Accord-

[3] MONY's reliance on the Due Process Clause of the Fourteenth Amendment is simply an "enlargement" of its argument under the Excessive Fines Clause of the Eighth Amendment and is "so connected with it in substance as to form but another ground or reason for alleging the invalidity of the . . . judgment." The Due Process Clause argument is, therefore, properly invoked. *Dewey v. Des Moines*, 173 U.S. 193, 198-99 (1899).

ingly, the Mississippi court did not allow argument of, nor did it decide, the federal constitutional issue.

Whether a litigant's failure to comply with a state procedural rule (in this case, the failure to present the Excessive Fines and Due Process challenges to the trial court in constitutional terms) bars this Court's consideration of a federal question is itself a federal question which this Court must decide. *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). In every case this Court must inquire whether the enforcement of a procedural forfeiture serves a legitimate state interest. If it does not, the failure to comply with a state procedural rule will not bar the assertion of a federal right. *Id.* at 447-48.

In addition, state procedural requirements which are not strictly or regularly followed cannot deprive this Court of the right to review. *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964). This Court held in *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982), that the Mississippi Supreme Court does not strictly or regularly decline to consider issues raised for the first time on appeal. Moreover, the Mississippi Supreme Court does not consistently deny parties leave to amend assignments of error to assert issues for the first time on appeal, as MONY sought to do in this case. *See, e.g., Kent v. Mississippi*, 241 So. 2d 657, 660 (Miss. 1970). Since the rule against asserting issues for the first time on appeal is not "strictly or regularly followed" by the Mississippi Supreme Court, it does not constitute an adequate and independent state ground barring review of the federal questions in this Court. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). Absent an adequate state ground for the Mississippi Supreme Court's refusal to consider MONY's federal constitutional defense, this Court has jurisdiction to review the judgment on a petition for a writ of certiorari. *Wright v. Georgia*, 373 U.S. 284, 287 (1963).

III. THE $1,500,000 PUNITIVE DAMAGE AWARD VIOLATES MONY'S RIGHTS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Whether the Excessive Fines Clause applies to a punitive damage award and whether the criteria for the imposition of punitive damages under Mississippi law contravenes the Due Process Clause of the Fourteenth Amendment were argued before this Court in *Bankers Life & Casualty Co. v. Crenshaw*, No. 85-1765 (U.S. Sup. Ct., argued Nov. 30, 1987). The arguments made to the Court by the appellant in *Crenshaw* are applicable to this case.

In Mississippi, in order to recover punitive damages from an insurer, the insured must prove by a preponderance of the evidence either (i) that the insurer acted with malice or (ii) that the insurer acted with gross negligence or reckless disregard for the rights of others. *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d 521, 531 (Miss. 1987), app. at 19a; *Aetna Casualty & Sur. Co. v. Day*, 487 So. 2d 830, 832 (Miss. 1986). "The amount of punitive damages is a matter committed solely to the . . . discretion of the jury." *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985). In *Crenshaw*, the Mississippi Supreme Court delineated certain "general factors" to be considered by a jury in assessing the appropriate amount of punitive damages to be imposed. Those factors include:

> (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future. [Citations omitted.];
>
> (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be

> deterred from the commission of similar offenses. [Citations omitted.]; and
>
> (3) The pecuniary ability or financial worth of the defendant. [Citations omitted.]

Id. at 278. The amount of punitive damages assessed by the jury "will not be disturbed unless for exceptional causes or the amount is arbitrary or unreasonable." *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d at 532, app. at 20a.

Whether challenged under the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment, the gross disproportionality of the fine in this case and the complete absence of standards governing the imposition of such a fine present important questions of federal law which should be settled by this Court.

A. The Excessive Fines Clause Question

The essence of the conduct which formed the basis of the award of punitive damages against MONY consisted of its delay in paying an insurance claim. Although the majority in its opinion refers to the "large number of policies" affected by MONY's failure to recognize an APL, *id.* at 528, app. at 12a, only one other policy claim was denied due to a similar administrative error involving the APL. *Id.* at 527, 529, app. at 8a, 13a-14a. After determining that the claim had been incorrectly processed in 1980, MONY tendered payment of the remaining death benefit, plus interest. That offer was refused, and the funds were paid into court in December, 1982. On the basis of such conduct the jury, with only "certain general factors" to guide it, assessed punitive damages against MONY in the amount of $8,000,000. Presumably because the punitive damage award was "arbitrary or unreasonable," the court ordered a conditional remittitur to $1,500,000, which was accepted by Re-

spondent on January 25, 1988. The maximum fine which could have been assessed upon the conviction of MONY in Mississippi for engaging in an "unfair or deceptive act or practice in the business of insurance," as prohibited by Miss. Code Ann. § 83-5-33 (1972), would have been $1,000.

A fine imposed by a jury which is 91 times greater than the amount of compensatory damages and 8,000 times greater than the statutory fine for an analogous criminal offense contravenes the constitutional principle of proportionality set forth in *Weems v. United States*, 217 U.S. 349, 367 (1910). The remittitur of the punitive damage award to $1,500,000, while dramatically decreasing the award, imposes a fine which remains disproportionate to MONY's conduct and 1,500 times greater than the analogous criminal penalty. The fact that a jury imposed punitive damages in the amount of $8,000,000 illustrates the capricious nature of punitive damage awards in Mississippi and exemplifies this Court's assertion that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

As Bankers Life and Casualty Company argued in its brief to this Court in *Crenshaw*, the concept of proportionality and moderation for governmentally imposed punishments carried from Chapter 20 of Magna Carta into the Eighth Amendment provides substantial protection from the infliction of excessive monetary punishment. Brief for Appellant at 25-27, 36-39, *Bankers Life & Casualty Co. v. Crenshaw*, No. 85-1765 (U.S. Sup. Ct., argued Nov. 30, 1987). The disproportionate punitive damage award in this case is constitutionally excessive.

B. The Due Process Clause Question

In Mississippi, as in other jurisdictions, punitive damages are awarded to punish the wrongdoer, deter others from similar acts and compensate the plaintiff for serv-

ice to the public in bringing the action. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d at 278. The jury's determination "will not be disturbed unless for exceptional causes or the amount is arbitrary or unreasonable." *Mutual Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d at 532, app. at 20a. Thus, although punitive damage awards are "quasi-criminal" sanctions, they are imposed without the types of safeguards present in criminal proceedings. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting, joined by Burger, C.J., and Powell, J.).

Punitive damages can be imposed in Mississippi, as here, under a vaguely defined, elastic standard such as "reckless indifference." Rather than providing an adequate procedural safeguard, such a standard "gives free reign to the biases and prejudices of juries." *Id.* at 88 (Rehnquist, J., dissenting, joined by Burger, C.J., and Powell, J.). A jury perceiving a violation of such a vague standard is free to impose monetary punishments in a civil action vastly greater than any legislatively prescribed penalty for criminal conduct.

This Court has held that:

> a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966). Where, as here, a state imposes an essentially criminal penalty, "the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983). The standards under which punitive damages are imposed and reviewed in Mississippi do not satisfy this Court's requirement that, before a state power can be exercised to punish and deter antisocial conduct, the government must articulate its aims with a reasonable degree of clarity. *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984).

A clear majority of this Court has:

> recognize[d] that "the alleged deterrence achieved by the punitive damages awards is likely to be outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 780 n.4 (1985) (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.), *quoting Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting, joined by Burger, C.J., and Powell, J.). The imposition of punitive damages in this case under "ill-defined" standards presents a federal question warranting this Court's plenary consideration.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Mississippi.

Respectfully submitted,

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April 11, 1988

APPENDICES

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APPENDIX A

SUPREME COURT OF MISSISSIPPI

No. 56046

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

v.

ESTATE OF RAY LAMAR WESSON, M.D., Deceased, by EMOGENE HALL, Administratrix as the Guardian of RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON and JASON MANNING WESSON, Minors; CORPORATE PLANNING, LTD.; and W.A. WIMBERLY

Nov. 12, 1987

Rehearing Denied Jan. 13, 1987

Natie P. Caraway, Richard D. Gamblin, Wise, Carter, Child & Caraway, Jackson, Roy C. Williams, Megehee, Brown, Williams & Mestayer, Pascagoula, J.P. Coleman, Ackerman, for appellant.

Paul S. Minor, Judy M. Guice, Minor & Benton, Clyde H. Gunn, III, Corban & Gunn, Biloxi, Charles R. Davis, Barry S. Zirulnik, Thomas, Price, Alston, Jones & Davis, Jackson, for appellees.

En Banc.

ROY NOBLE LEE, Chief Justice, for the Court:

The administratrix of the estate of Dr. Ray Lamar Wesson, deceased, [Wesson] joined by the guardian of Dr. Wesson's four minor children, filed suit in the Cir-

cuit Court of Jackson County against Mutual Life Insurance Company of New York [hereinafter MONY], Corporate Planning, Ltd., and W.A. Wimberly for the sum of eighty-seven thousand one hundred thirty-six dollars ($87,136.00), face value of an insurance policy covering the life of Dr. Wesson and for punitive damages resulting from the insurance company's bad faith in declining to pay the policy amount. Corporate Planning, Ltd. and W.A. Wimberly, alleged to be agents of MONY, filed a cross-claim against MONY for damages, actual and punitive, for loss of business and injury to reputation. At the end of the trial, the lower court granted a peremptory instruction in favor of the latter two defendants on the claim against them by Wesson.

The jury returned a verdict for Wesson against MONY in the sum of $87,136.00, actual damages, and eight million dollars ($8,000,000) in punitive damages; and a verdict in favor of Corporate Planning, Ltd. and W.A. Wimberly against MONY in the sum of three hundred fifty thousand dollars ($350,000). MONY has appealed from the judgments.

I.

This discussion under Part I relates to the suit of Wesson against MONY.

Facts

In early 1974, Dr. Ray Lamar Wesson and Dr. Jerry Adkins organized the Surgical Clinic of Biloxi, P.A., a professional corporation. Through the advice and assistance of W.A. Wimberly and Corporate Planning, Ltd., his company, agents of MONY, the Surgical Clinic set up a retirement plan by forming a pension trust retirement plan designating Drs. Wesson and Adkins as trustees. The second company formed and owned by Wimberly, i.e., Corporate Investments, sold a MONY whole life insurance policy through the pension trust retirement fund to the Surgical Clinic insuring the life of Dr. Wesson.

The insurance policy was dated February 1, 1974, for a face amount of $87,136.00. Wimberly, as MONY's field underwriter, submitted the special class-employee policy application of Dr. Wesson to MONY, which application became a part of the policy. Question 9 of the application, together with the answer, follows:

9. Auto. Prem. Loan provision operative if available?

Yes X No —

The Automatic Premium Loan provision referred to in Question 9 is set forth on page 11 of the insurance policy:

> AUTOMATIC LOAN TO PAY PREMIUMS (Subject to conditions specified below)—This provision shall become operative if requested in the application for this Policy or whenever written request is received by the Company at its Home Office before any premium is in default beyond the grace period. It shall become inoperative, as to premiums not yet paid, upon (a) receipt by the Company at its Home Office of written request to that effect or (b) election of an Optional Benefit on Lapse within the grace period.
>
> While this provision is operative and the loan value is at least as great as the total unpaid premium plus any existing indebtedness, each premium for this Policy due and not otherwise paid will be paid by automatic loan on the last day of the grace period. However, a premium shall not be paid by automatic loan if all premiums due during the twelve policy month interval prior to the due date of such premium have been paid by automatic loan and no payment toward indebtedness under this Policy has been made during such interval or during the grace period of such premium.

Further, Endorsement #73500 was issued by MONY with the Wesson policy which strengthened insured's rights in connection with the original Automatic Premium Loan (APL) provision, and provided in pertinent part:

> Automatic Loan to Pay Premiums—This provision shall become operative if requested in the application for this Policy or whenever written request is received by the Company at its Home Office before any premium is in default beyond the grace period.

After receiving Dr. Wesson's application, MONY's Jackson, Mississippi, office forwarded it to the main office in New York, where Annie Kimmerle, an Installation Specialist in MONY's pension trust department, reviewed the application and sent it to the Policy Issue Department, with instructions that Dr. Wesson's policy be issued without APL. Kimmerle later testified that, although the application requested APL, she was aware of MONY's policy regarding APL and instructed Policy Issue accordingly. MONY was relying on an interpretation of non-transferability Endorsement #64540 that it negated the effect of the APL provision. The endorsement in Dr. Wesson's policy read:

> Neither the insured nor the beneficiary may sell, assign, discount, pledge or encumber any interests in this policy except to or through the Mutual Life Insurance Company of New York, and then only in accordance with the right conferred upon him or her under the terms of the Policy.

As a result of Kimmerle's instructions, Policy Issue coded its computer to reflect a "0" under the APL column in its master message printout (computer) to show that APL was not in that policy. Kimmerle then sent a memo to Don Coatsworth, office supervisor of the Jackson office, informing him of MONY's decision not to honor the APL request. Wimberly denied that this information was ever

relayed from Coatsworth to him. The policy was then sent to Wimberly, who forwarded it to Dr. Wesson at the Surgical Clinic. Wimberly received a data card for his records, which card indicated that no APL was provided.

At trial, several pension trust policies, other than the Wesson policy, were introduced in evidence and they reflected that APL was requested in their applications, but no instructions were sent by Kimmerle to the Policy Issue Department. Notwithstanding that absence, the master message printout of those policies was coded "0" for the APL as was Dr. Wesson's policy.

After issue of Dr. Wesson's policy, MONY altered its Special Class-Employee Application to delete Question 9 relating to the offer of APL to the insured. Subsequently, MONY became aware that the Endorsement #64540, mentioned above, did not negate the effect of a requested APL in a pension trust policy. This became clear as early as October 21, 1976, in an interoffice memorandum from Pauline Dana-Bashian to Mary Martini advising her that the non-transferability Endorsement #64540 does not negate APL. Also, on October 27, 1976, Joan Rapp of MONY's Policy Forms Department, sent a memo to Don Coe of MONY's Sales Department, advising him that, although the policy application was changed in 1974, some policies still include APL and that "these issues are not endorsed to make APL inoperative."

On September 16, 1975, Lou Roth, Vice President and Chief Actuary of MONY, sent a memo to Rudy Vadala [sic], Vice President and department head of MONY's Office Operations Department, wherein he set out that the Actuarial Department did not believe in selling the APL option; that if an insured is on the verge of lapse, MONY should inform him of his rights to continue the policy under APL; and that MONY should have a program of informing agencies and policyholders of the rights under the APL provision only when lapse or sur-

render seems imminent, and not on a massive scale to all policyholders.

When MONY learned of the ineffectiveness of the non-transferrability endorsement #64540 in 1976, it was also apprised of a situation where a large number of pension trust policies had been coded in the computer to indicate that APL was operative. The code number appearing in the APL column of the master message print (computer printout) would have to be a number other than "0" to indicate an operative APL provision. A memo from Delores Hart, Supervisor of MONY's Field Relations Program, to Yolanda Boytell, head of MONY's Quality Control Department, dated September 14, 1976, indicated that this was taking place:

> *APL's on Pension Trust and Profit Sharing Plans.* Issue has been allowing APLs on Pension Trust and qualified profit sharing plans except for Master Annuity per Dot McCarthy and the Pension and Profit Sharing Manual. APL is not available on any Pension Trust and qualified plans. (I don't know about non-qualified). That's in parenthesis. Peg Hess will talk with Carolyn Beltnap and Dot to change their rules. Also, the Special Class Application (since 1974) do not ask if APL is wanted. However, what can we do to prevent APLs from processing on policies which allowed APLs which shouldn't be allowed? And, how and who corrects the ones which are incorrect at present? Please let me know what will happen with these. Seems that this is no small thing. Thanks, Dot.

MONY assigned Mary Martini the project of investigating and rectifying the problem.[1]

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[1] The project did not involve Dr. Wesson's policy since his policy was coded from its inception into the computer indicating no APL provision. Reference to the project indicates MONY's inconsistency regarding its attitude and conduct toward APL provisions.

In a memo by Mary Martini to Don Raves, Sales Department, February 9, 1977, she estimated that 25,000 pension trust policies having APL provisions might be involved in the investigation. Her investigation revealed that pension trust and profit-sharing policies issued prior to May, 1974, were issued with APL, if requested on the application. After learning from Pauline Dana-Bashian's memo of October 21, 1976, that the current non-transferrability endorsement had no negative effect on APL provisions, Martini drafted sample letters to inform current policyholders of their operative APL provision, and its possible IRS implications. However, the letters were never sent to the policyholders, and the project was terminated.

Wesson's Death

On March 14, 1980, Dr. Wesson, along with his wife, died as a result of a plane crash in Poland, while accompanying the United States Amateur boxing team en route to a match against the Polish team. At the time of his death, the premium, which was due February 1, 1980, had not been paid. After being informed of Wesson's death, Wimberly contacted Emmie Holt at MONY's Jackson office to inquire about the status of the policy since the February 1, 1980, premium was unpaid. She relayed the request to MONY's home office in New York, and on March 26, 1980, MONY's New York office sent a TELEX message to Holt stating, "Since two premiums are due and unpaid and no APL provision was provided for, the policy will be lapsed to reduced paid up ($3,687.00)."

The grandmother of the Wesson children, beneficiaries of their father's policy, employed Attorney Clyde H. Gunn in the matter, and he contacted MONY on March 24, 1980, advising of Dr. Wesson's death and requesting a claims form. In May, 1980, Attorney Gunn sent in the claims form and copy of the policy to MONY and on June 2, 1980, MONY sent four form letters to its Jack-

son office informing them that the policy was lapsed to reduced paid-up value of $3,687.00. Attorney Gunn made demand for the full face amount on July 10, 1980, to which MONY replied on August 5, 1980, giving the same explanation as stated hereinabove. The Wessons filed suit against MONY on August 30, 1982.

In denying the claim MONY relied only on the master message print (computer printout). This modus operandi of MONY in evaluating a claim was uncontradicted. Although the master message print indicated that an APL provision was not in Dr. Wesson's policy, the testimony showed that only the application of Dr. Wesson listed the beneficiaries, and claims personnel referred to it at the time the claim was filed to ascertain the beneficiaries. Question and answer #9 indicating APL was on the application.[2]

Between the time of Dr. Wesson's death and the filing of suit, in early 1981, MONY unilaterally altered its computer to reflect a "0" for APL in its master message print on all tax qualified whole life policies. After suit was filed and discovery had, this action was found out. MONY then attempted to rectify the situation by identifying the policies which had requested APL, changing its computer to reflect such, and notifying policyholders of the risk they run of having their plans lose their tax-exempt status.

As a result of this investigation, MONY discovered fifty (50) death claims involving tax-sheltered policies, with eight (8) of those 50 being paid on a reduced paid-up basis. Of those eight, two, including Dr. Wesson, requested APL. The other policy was then paid in the full amount of its face value. Of the pension trust policies still in force, MONY discovered 1,614 policies which

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[2] The 1978 and 1979 premiums were paid by loans against the cash value made by Drs. Wesson and Adkins, who signed service request forms to facilitate premium payments in that manner.

requested APL and were originally coded in its computer reflecting such, but were unilaterally changed to indicate no APL in 1981. MONY also discovered 182 policies wherein APL was requested but coded at issuance to indicate no APL. If Dr. Wesson had lived, his policy would have fallen into this latter category.

MONY discovered the existence of the APL provision in Dr. Wesson's policy just prior to the due date of its answer to the complaint. MONY was served with the complaint December 2, 1982. MONY notified local counsel in Jackson, Mississippi, of the complaint, telling him it was a simple lapse case and that he should defend it vigorously. Marion Marable, the person making contact with local counsel, relied upon the information contained in the master message print, notwithstanding that, at that time, the file was in his possession containing the complete policy. MONY's local counsel, while reviewing the policy with MONY personnel at its Jackson office, discovered the inclusion of the APL provision in the policy and MONY was notified of this by local counsel on October 11, 1982. MONY filed an answer, denying liability, but, on December 15, 1982, amended its answer, admitted liability and paid the face value of the policy, with interest, into court.

As a result of the suit, MONY took certain corrective measures. Also, it now requires its death claims personnel to review the application when evaluating a death claim.

Issues

A.

FAILURE TO GRANT MONY'S MOTION FOR DIRECTED VERDICT, REQUEST FOR PEREMPTORY INSTRUCTION, AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

MONY contends, under this assignment, that (1) there was no intentional refusal on its part to pay the Wesson claim; (2) MONY had no actual knowledge nor lack of arguable reason when it denied the claim; and (3) therefore, punitive damages were inappropriate.

The case we consider today is commonly characterized as a "bad faith insurance claim," viz, where an insurance company declines payment of a known, legitimate claim under an insurance policy without justifiable reason. Since *Standard Life Ins. Co. of Indiana v. Veal*, 354 So. 2d 239 (Miss.1977), there have been at least sixteen (16) bad faith cases decided by this Court, involving the question of whether or not they were proper cases for the submission of the punitive damages issue to the jury. Thus, in the case sub judice, we are not travelling an undefined trail, but, rather, a well-marked highway. The phrase "arguable reason" for denying a claim excluding punitive damage liability first appeared in *Veal* and has been argued in most of the cases since that decision. For instance:

In *Travelers' Indemnity Co. v. Wetherbee*, 368 So.2d 829 (Miss.1979), the Court held a punitive damage instruction was proper and that the evidence was sufficient to support the verdict for damages thereunder arising from the intentional withholding of the contents coverage, a gross breach, the equivalent of an independent tort.

In *Aetna Cas. & Surety Co. v. Steele*, 373 So.2d 797 (Miss.1979), the Court held there was an arguable reason

to not pay the claim of appellee, and, under the ruling cases cited, punitive damages and attorney's fees are not proper.

In *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239 (Miss.1977), the defendant failed to honor the legitimate claim filed following the death of plaintiff's wife and there was no reason whatever to justify its action. Punitive damages were proper.

In *Reserve Life Ins. Co. v. McGee*, 444 So.2d 803 (Miss.1984), the Court held that where the evidence constituted disputed facts as to whether or not a certain situation existed, then the issue should be submitted to the jury on punitive damages.

In *National Life & Accident Co. v. Miller*, 484 So.2d 329 (Miss.1985), the Court said:

> Where these agents fail to correctly record Mrs. Miller's responses on the application and then further failed to bring that error to the attention of the claims department and, in fact, misrepresented the extent of their knowledge, it cannot be said that a jury would not be justified in finding that those agents' actions amounted to willfulness or such gross negligence as to amount to reckless disregard of the Millers' rights.

In *Weems v. American Security Ins. Co.*, 486 So.2d 1222 (Miss.1986), the Court said:

> The absence of an arguable reason, however, does not lead inexorably to an assessment of punitive damages. This is because, as said above, the substantive test for awarding punitive damages is the same in bad faith refusal cases as in any other case where punitive damages are sought. That test requires the plaintiff to show some willful or malicious wrong or the gross or reckless disregard for the rights of others. (Citations omitted).

Weems, 486 So.2d at 1226-27.

Following close upon the heels of *Weems, Aetna Cas. & Surety Co. v. Day*, 487 So.2d 830, 832 (Miss.1986), the Court held:

> To recover punitive damage from an insurer for amounts over and above policy benefits an insured must prove by a preponderance of the evidence either (1) that the insurer acted with malice, or (2) that the insurer acted with gross negligence or reckless disregard for the rights of others.

From the facts stated hereinbefore, it cannot be contended seriously that MONY had an arguable reason or a legitimate reason or a justifiable reason (all three amount to the same) for denying the Wesson death claim. Finally, after all pleadings were filed, MONY amended its answer and paid into the registry of the court the sum of $87,136.00, the face amount of the policy. The issue of punitive damages was properly submitted to the jury as to whether or not there was a gross or reckless disregard by MONY to the rights of Wesson and others. We reject the argument of MONY that a unilateral mistake on the part of MONY gives it a proper reason for declining to pay the Wesson claim and that it had no actual knowledge as to the APL provision in the Wesson policy. MONY's contention that it is guilty of only simple negligence is overwhelmingly rebutted by the following occurrences:

(1) the intentional coding in accordance with its policies and procedures into its computers of no APL, although requested by Wesson through Wimberly in his policy;

(2) the failure to rectify the coding once it was discovered by MONY in 1976 that endorsement # 64540 did not abrogate the APL provision in such policies as Dr. Wesson's;

(3) this was not an isolated incident, but, rather, involved a large number of policies;

(4) in 1980, the denial of the Wesson claim based on a review of the master message print only, specifically in light of its past action and acquired knowledge with regard to APL in its computer;

(5) the failure of MONY personnel to review the policy when deciding whether to pay a claim; and

(6) the denial of liability in its answer at a time that MONY was on notice as to the APL's existence. *Richards v. Allstate Ins. Co.*, 693 F.2d 502 (5th Cir.1982).

We hold that the question of punitive damages was correctly submitted to the jury, and we reject MONY's first contention.

B.-C.

PLAINTIFF'S DUTY TO DEAL IN GOOD FAITH. IMPROPER INTRODUCTION OF FINANCIAL STATEMENT.[3]

MONY contends that there was error for the trial judge to strike its defense that the attorneys for the Wesson Estate had failed to deal with MONY in good faith and to mitigate damages. Even so, MONY did introduce some evidence with an assertion that there was bad faith on the part of the insured, and the Court instructed the jury, "The law imposes upon both parties to a contract the duty to deal with each other fairly and in good faith. . . ." Early, appellant made its determination that no APL existed in the Wesson policy and denied the claim long before the letter of July 10, 1980, was sent by Attorney Gunn. This suit brought to light many MONY practices

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[3] The question of what effect, if any, the Employee Retirement Income Security Act of 1974 (ERISA) [29 U.S.C. §§ 1001, et seq.] as interpreted by *Pilot Life Ins. Co. v. Dedeaux*, —— U.S. ——, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), has upon this claim is not addressed, since it was not raised in the lower court or in the appellate briefs and argument. (NOTE that *Pilot* was decided after this case was submitted).

which could have resulted in more wrongful denials of death claims and resulted in subsequent proper payment of at least one wrongfully-denied death claim. There is no merit in this position. *Standard Life Ins. Co. of Indiana v. Veal, supra*; *Bankers' Life & Cas. Co. v. Crenshaw*, 483 So.2d 254 (Miss.1985).

Appellant contends next that the trial judge erred in allowing Wesson to introduce MONY's financial statement during its case in chief prior to any evidence offered by MONY and prior to a resolution by the lower court that a punitive damage issue was made.

It is an elementary principle of law that testimony of the net worth of a defendant is not admissible where the jury is not warranted in awarding punitive damages. *Progressive Cas. Ins. Co. v. Keys*, 317 So.2d 396, 398 (Miss.1975), citing *Western Union Telegraph Co. v. Cashman*, 132 F. 805 (5th Cir.1904); *Pullman Palace-Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53 (1897).

In the present case, the issue of actual damages was not before the jury since MONY had paid the face value of the policy into court and a verdict was directed on behalf of the Wessons. The only question for the jury was whether or not punitive damages would be allowed. If there had been no issue, the case would have terminated. That being the only issue, no error was committed. We observe that it is for the trial judge to determine, in a situation such as developed at this point of the trial below, the order in which financial records would be allowed and the conduct of the trial. We are of the opinion that the trial judge did not abuse his discretion, and the argument is rejected.

D.-E.

BURDEN OF PROOF ON ARGUABLE REASON.

JURY CHALLENGES.

Appellant contends that Jury Instruction 014 improperly places the burden of proof on MONY to show that it had an arguable reason for denying the Wesson death claim. The instruction follows:

JURY INSTRUCTION 014

> The Court instructs the jury that Defendant MONY has the burden of proving by a preponderance of the evidence, if any, its defense that it had an arguable or legitimate basis for denying the Wesson death claim. In addition, the arguable or legitimate basis asserted by MONY must be the proximate cause of the denial of the claim. In other words, MONY may not deny the claim at the time it was presented for one reason, and, after a lawsuit has been filed, commence an intensive investigation in an effort to find another basis for the denial.
>
> Therefore, if you find from a preponderance of the evidence in this case, that the initial decision to deny the claim on the Wesson policy was not proximately caused by an arguable or legitimate reason, then it is not a defense to MONY that, after denial of the claim and after commencement of this lawsuit it attempted to develop an additional reason for denial of the claim, and any such reason for denial of the claim which was not the basis of the original denial cannot insulate the Defendant, MONY, from an award of punitive damages.

Appellant cites *Blue Cross & Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1985), where, on petition for rehearing, the Court wrote: "A plaintiff has a heavy burden to demonstrate to the trial court that there

was no reasonably arguable basis for the insurance carrier to deny the claim." 466 So.2d at 844.

Appellee claims that Jury Instruction 004, when read and considered with Instruction 014, correctly states the law and cures any error in 014. That instruction follows:

JURY INSTRUCTION 004

> The Court instructs you that if you find from a preponderance of the evidence in this case, if any, that the Defendant, MONY, failed to provide adequate procedures to prevent the denial of the death claim of Ray Wesson and that such failure, if any, was attended by such gross negligence as to indicate reckless disregard of the rights of the children of Dr. Ray Wesson, deceased, and further that MONY lacked an arguable reason for denying the death claim of Ray Wesson, then you may assess punitive damages against the Defendant, MONY.

We are of the opinion that the first part of Instruction 014 improperly stated the burden of proof on MONY to prove by a preponderance of the evidence its defense that MONY had an arguable or legitimate basis for denying the Wesson claim. However, the second paragraph in the instruction correctly places the burden of proof upon the Wessons to prove by a preponderance of the evidence that there was no arguable or legitimate reason for MONY to deny the claim. When it is considered together with Instruction 004, we do not think the instruction constitutes reversible error. This is particularly true, since the evidence is overwhelming that MONY had no arguable, legitimate or justifiable reason to deny the claim and was grossly negligent in doing so.

MONY next asserts that the lower court erred in allowing four (4) peremptory jury challenges to Corporate Planning, Ltd. and Wimberly, and four (4) to the Wesson estate while granting only four (4) peremptory challenges to MONY. The argument is that MONY should

have been allowed eight (8) peremptory challenges because Wimberly and Wesson were in concert with each other.

Miss.R.Civ. 47(c) provides:

> (c) *Challenges.* In actions tried before a twelve-person jury, each party may exercise four peremptory challenges; in actions tried before a six-person jury, each party may exercise two peremptory challenges. Parties may challenge any juror for cause. In all claims or actions tried together, two or more parties having relatively similar interests may be aligned as a single party or the court may permit challenges to be exercised separately or jointly.

The trial judge stated: "I have been impressed with the manner in which he has pursued his position in this case. I really have. I'm talking about Mr. Davis [Wimberly's attorney]. I feel like they are separate; that he is separated from the plaintiff."

In *Acree v. Collins*, 239 Miss. 583, 124 So.2d 118 (1960), the question arose as to the adversity necessary to allow all parties the requisite number of jury challenges. The Court said: "The trial court has a measure of discretion in such matters, and we are in no wise able to say that he erred in this respect." 239 Miss. at 587, 124 So.2d at 120.

We are of the opinion that the lower court did not abuse its discretion on granting peremptory challenges.

F.-G.

DENIAL OF MOTION TO AMEND JUDGMENT ORDER ENTERED AFTER PERFECTION OF APPEAL

MONY contends that the lower court erred in overruling its motion to amend judgment, asserting that the actual damages, to which it offered no objection at the

time the peremptory instruction was given thereon, are erroneous. It claims that the $87,136.00 face value of the policy should be reduced as follows:

$6,151.33 for outstanding loans against the policy

406.00 interest on outstanding loans

342.94 for two monthly premiums of Feb. & March, 1980 due to the operation of the APL provision.

To this result, MONY claims there should be an addition of $107.49 for post-mortem dividend. Consequently, MONY avers that the actual amount owed by it on the policy is $80,349.16.

No authority is cited by appellant or appellee, other than Miss.R.Civ.P. 59(e) in support of its argument. It is uncontradicted that MONY failed to object to the peremptory instruction and to the return of a judgment for Wesson in the amount of $87,136.00 actual damages. The question of pre-judgment interest was also argued on the motion to amend. There being no specific objection to the instruction when granted, we do not consider the assigned error. *Shell Oil Co. v. Murrah*, 493 So.2d 1274 (Miss.1986); *Brown v. McCoy*, 362 So.2d 186 (Miss. 1978).

MONY contends that the lower court judge's order of June 21, 1984, should be set aside; that it was entered some two months after appeal to this Court had been perfected. On November 5, 1983, the lower court entered an order protecting the confidentiality of certain documents produced by MONY pursuant to discovery. Appeal was perfected to this Court on April 24, 1984, and on the same day, an order was signed by the trial judge declaring that plaintiff's motion to dissolve the motion of confidentiality be taken under advisement and the court retain its jurisdiction and carry the matter over for a decision during either April term of the court or in vacation.

Thereafter, on June 21, 1984, the judge made his final ruling.

If the lower court committed error here, it is irrelevant to this appeal and we decline to address the point.

H.

EXCESSIVE AWARD OF PUNITIVE DAMAGES

The Court has held in Section A of this opinion that the question of punitive damages was correctly submitted to the jury. Now, we consider whether the sum of $8,000,000 awarded in punitive damages is excessive and, if so it is, what amount would be proper.

Punitive damage awards have long been recognized and approved in Mississippi jurisprudence, when reasonably applied under the proper facts and standards. Prior to 1977, the usual case for punitive damages was (1) involving gross negligence resulting in personal injuries or (2) some flagrant act by a wrongdoer, which amounted to willful, malicious, or wanton conduct. Beginning with *Standard Life Co. of Indiana v. Veal*, 354 So.2d 239 (Miss. 1977), $25,000 punitive damage award, and extending through *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss.1985), 1.6 million dollar punitive damage award, there has been an evolution (revolution) in "bad faith" punitive damage awards, now culminating with the present punitive damages assessed in the sum of $8,000,000.

In the recent case of *Bankers Life & Casualty Co. v. Crenshaw, supra*, the Court set out general factors to be considered in awarding damages:

> With regard to punitive damages, our rules are necessarily general. Once it is established that punitive damages in some amount should be allowed, the quantum thereof is determined by reference to certain general factors which include:

(1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future, *Standard Life Co. of Indiana v. Veal*, 354 So.2d 239, 248 (Miss.1977);

(2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses. *Reserve Life Insurance Co. v. McGee*, 444 So.2d 803, 808 (Miss.1983); *T.C.L., Inc. v. LaCoste*, 431 So.2d 918, 923 (Miss.1983); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 460 (Miss. 1983); *Snowden v. Osborne*, 269 So.2d 858, 860 (Miss.1972); and

(3) The pecuniary ability or financial worth of the defendant, *Collins v. Black*, 380 So.2d 241, 244 (Miss.1980); *Allen v. Ritter*, 235 So.2d 253, 256 (Miss.1970); *Standard Life Insurance Co. of Indiana v. Veal*, 354 So.2d 239, 249 (Miss.1978); *Jones v. Carter*, 192 Miss. 603, 610, 7 So.2d 519 (1942).

483 So.2d at 278.

In addition, the punitive damage award amounts to a measure of compensation to the plaintiff for service to the public in bringing the action, which should act as a deterrent of similar acts of wrongdoing to other members of the public.

The allowance of punitive damages, upon gross negligence, as here, and actual damages, is within the province of the jury upon questions of gross negligence, negligence and contributory negligence. Punitive damages will not be disturbed unless for exceptional causes or the amount is arbitrary or unreasonable. *See Yazoo & Miss. Valley Railroad Co. v. Williams*, 87 Miss. 344, 39 So. 489 (1905); *Hines v. Imperial Naval Stores*, 101 Miss. 802, 58 So. 650 (1912); *Yazoo & M.V.R. Co. v.*

May, 104 Miss. 422, 61 So. 449, 450 (1913); *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 141 So.2d 226, 233 (1962).

We do not pick out one of the factors enumerated in *Bankers Life*, *supra*, and additional considerations, and emphasize that factor above the others in the consideration of a punitive damage award. Five states have adopted statutory provisions dealing with punitive damages. For instance, Fla.Stat.Ann. § 768.73(2)(a, b), et seq. (Supp.1987), compels that forty percent (40%) of a punitive damage award will go to the plaintiff and the remaining sixty percent (60%) of the award to the Public Medical Assistance Trust Fund.

In *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Civ.App.1986), which involved the wrongful death claim for a child burned by an exploding gas tank on a Ford Mustang II, the punitive damages returned by the jury amounted to $100,000,000, which was remitted by the trial court to $20,000,000. The Appeals Court then reduced the punitive damages to $10,000,000, stating that the actual damage award was 2.3 million dollars. The Appeals Court further considered the following factors in arriving at the award: (1) nature of the wrong, (2) character of the conduct involved, (3) degree of culpability of wrongdoer, (4) situation and sensibilities of parties concerned, (5) extent to which such conduct offends a public sense of justice and propriety, and (6) the proportion that the punitive damage award bears to the compensatory damage award. The court further iterated that deterrents and punishment are prime objectives in awarding punitive damages, and a strong consideration was the proportion of actual damages to punitive damages.

In *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348, 119 Cal.App.3d 757 (1981), a horribly burned fire victim of an exploding gas tank on a Ford Pinto was awarded $125,000,000 in punitive damages. The lower court re-

mitted that amount to 3.5 million dollars, which was affirmed by the appellate court.

In *Ford Motor Co. v. Durrill, supra,* and *Grimshaw v. Ford Motor Co., supra,* the awards were for terrible personal injuries sustained by the victims, rather than bad faith claims with no personal injuries or actual damages, other than the policy limits, such as are involved here. As stated hereinabove, appellant MONY paid the face amount of the policy, *i.e.,* $87,000 into the court, before trial, when MONY was finally made aware of the gross mistakes and blunders made by it in denying the validity of the claim.[4] The punitive damage award is ninety-two (92) times (in round figures) the admitted amount of the actual damages. The appellees claim no other actual damages, although, of course, their time, attorney's fees and expenses were incurred. The trial below involved only the question of punitive damages.

Again, we have examined the bad faith cases decided by this Court from *Standard Life Insurance Co. of Indiana v. Veal, supra,* through *Bankers Life & Casualty Co. v. Crenshaw, supra,* and have analyzed and compared them with reference to the case sub judice. In applying the standards which we have discussed, the Court is of the opinion that the punitive damages awarded in this case are excessive after applying the established standards, and that a remittitur should be entered in accordance with the authority of Mississippi Code Annotated § 11-1-55 (Supp.1984), as stated in *Bankers Life & Casualty Co. v. Crenshaw,* 483 So.2d at 278-279. *See also Standard Life Insurance Co. of Indiana v. Veal, supra* at 249; *Jesco, Inc. v. Whitehead,* 451 So.2d 706, 714-716 (Miss.1984) (Robertson, J., concurring).

Therefore, we order a remittitur in the sum of six million five hundred thousand dollars ($6,500,000), on the punitive award of $8,000,000. If the appellee, Wes-

[4] We are aware that the net assets of MONY are $8 billion.

son, enters such remittitur so as to reduce the punitive damage award to one million five hundred thousand dollars ($1,500,000) within ten (10) days after the judgment of this Court becomes final, then the award as reduced will be affirmed. Otherwise, the cause will be reversed and remanded to the lower court for trial upon the issue of punitive damages alone.

II.

This discussion under Part II relates to the suit of W.A. Wimberly and Corporate Planning, Ltd. and the judgment in their favor against MONY in the sum of three hundred fifty thousand dollars ($350,000).

Wimberly was a knowledgeable and experienced insurance broker. In 1973, he became an agent of MONY under a brokerage agreement. Prior thereto, in 1972, he had formed Corporate Planning, Ltd., which was for the purpose of consulting with and advising prospective insurance customers, and in 1973, he organized Corporate Investments, Ltd., which was for the purpose of selling insurance to be included in plans established and administered by Corporate Planning, Ltd. Wimberly became involved with Caleb Dortch, MONY's agency manager for the Mississippi territory, and MONY's highest ranking authority in Mississippi at that time. Dortch informed Wimberly of operations by other agents, which were being put to use to maximize sales and profits and explained to Wimberly those operations, which were designed to avoid conflict with the Investment Advisers' Act. Dortch testified that he was well acquainted with Wimberly's organizational setup.

On July 20, 1973, Wimberly entered into on behalf of Corporate Investments, a brokerage and extended commission agreement with MONY. Wimberly was selling large amounts of insurance for MONY, and a broker expense reimbursement plan was offered to, and accepted by, Wimberly, whereby he would be reimbursed for ex-

penses up to the amount of commissions earned. Wimberly testified that MONY's contract was with Corporate Investments, but MONY understood that Corporate Planning and Corporate Investments were one and the same. A memorandum from Dortch to Don Coatsworth, MONY's office manager, dated September 7, 1973, corrobated [sic] Wimberly as to the identity of Corporate Planning and Corporate Investments. Further, in May of 1974, Dortch wrote to Wimberly, congratulating him as a result of the sales for MONY and advising him that he qualified for the convention of MONY's top producers. Dortch's letter stated: "The contribution made by Corporate Planning has been invaluable to our agency. All of us certainly appreciate working with you."

On February 1, 1974, Corporate Planning entered into a contract with the Surgical Clinic (Wesson's clinic) to administer its pension and profit-sharing plan. Wimberly had helped Drs. Wesson and Adkins incorporate their medical practice and establish retirement plans for Surgical Clinic. Through Corporate Investments, Wimberly sold to the Surgical Clinic the MONY life insurance policy covering Dr. Wesson, which is the subject of this lawsuit.

Evidence was introduced on the trial by Wimberly and MONY on the question of agency of Wimberly and Corporate Planning. During the trial, Wimberly propounded a request for admissions to MONY, and MONY admitted Corporate Planning and Wimberly were its agents, although two weeks before trial MONY denied agency, explaining that it had only then realized that the brokerage agreement was with Corporate Investments and not Corporate Planning or Wimberly. On December 11, 1980, MONY terminated Wimberly's commission agreement because of low production.[5]

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[5] Dr. Wesson died March 14, 1980.

When the Wessons filed suit against MONY and Wimberly and Corporate Planning in August, 1982, Wimberly contacted MONY seeking legal representation to defend the suit against him and Corporate Planning based upon his agency status with MONY. The request for representation was declined by MONY on the advice of counsel that there was a conflict of interest. Wimberly's cross-claim against MONY sought actual and punitive damages from MONY as a result of its wrongful refusal to pay the Wesson death claim, together with damages incurred from providing his own defense. There was a stipulation among the parties that Corporate Planning and Wimberly incurred reasonable attorney's fees in the sum of seventy-three thousand dollars ($73,000). As stated, the jury verdict for Corporate Planning and Wimberly on the cross-claim was $350,000 actual damages. The jury declined to assess punitive damages.

Legal Issues

A.

FAILURE TO GRANT MONY'S MOTION FOR DIRECTED VERDICT, REQUEST FOR PEREMPTORY INSTRUCTION, AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

MONY contends that under the allegations of the complaint and evidence, MONY had no contract with Corporate Planning and Wimberly as agents and that they were not agents of MONY but were agents of the Surgical Clinic; and that MONY owes no indemnity to Corporate Planning and Wimberly for litigation fees. The question of agency was submitted to the jury, which found in favor of Corporate Planning and Wimberly. The applicable principle of law was stated in *Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 657 (Miss.1975), and has been brought forward numerous times since the decision in *Paymaster*:

> The established rule is that when the Court considers whether the defendant is entitled to a judgment as a matter of law, the Court should consider the evidence in the light most favorable to plaintiff, disregard any evidence on the part of defendant in conflict with that favorable to plaintiff, and if the evidence and reasonable inferences to be drawn therefrom would support a verdict for plaintiff, the jury verdict should not be disturbed. [sic]
>
> The quotation above, we believe, expresses the better rule for peremptory instruction or a JNOV since it permits the court to examine the evidence of both parties that is not in conflict, as here, in order to reach a legal conclusion; or stated differently, the jury resolves conflicts of fact—the court resolves issues of law arising from non-conflicting facts. [sic]

The Restatement (2d) of Agency §§ 438 and 439 (1958), states the principal's duty to indemnify the agent, in pertinent parts, as follows:

> § 438. *Duty of Indemnity; the Principle*
>
> (1) A principal is under a duty to indemnify the agent in accordance with the terms of the agreement with him.
>
> (2) In the absence of terms to the contrary in the agreement of employment, the principal has a duty to indemnify the agent where the agent
>
> • • • •
>
> (b) suffers a loss which, because of their relation, it is fair that the principal should bear.
>
> § 439. *When Duty of Indemnity Exists*
>
> Unless otherwise agreed, a principal is subject to a duty to exonerate an agent who is not barred by the illegality of his conduct to indemnify him for:
>
> • • • •

> (d) expenses of defending actions by third persons brought because of the agent's authorized conduct, such actions being unfounded but not brought in bad faith; and [sic]

There is a dearth of authority on this question in Mississippi, but the principle is widely accepted by authorities in other jurisdictions. In *Southern Farm Bureau Cas. Ins. Co. v. Gooding*, 263 Ark. 435, 565 S.W.2d 421 (1978), the Arkansas Court allowed the agent to be indemnified by the insurer, stating:

> Second, it is argued that Southern Farm Bureau's agent, Rodman, should not have been allowed to recover the expenses and attorney's fee he incurred in defending the third-party complaint filed against him by the Goodings. We think the recovery was proper. A principal has a duty to indemnify his agent when the agent suffers a loss which, because of their relation, it is fair that the principal should bear. Restatement, 2d, Agency, § 438 (1958). In particular, the agent can recover the expenses of defending an action brought by a third person because of the agent's authorized conduct. *Id.*, § 439. If Rodman represented to the Goodings that the lowboy would be covered while being pulled by an insured vehicle, that representation was correct. Rodman, the agent, was subjected to the expense of litigation because his principal, Southern Farm Bureau, erroneously denied that the coverage existed. In the circumstances it is fair that the principal be required to indemnify the agent for his expenses, including his attorney's fee.

Gooding, 565 S.W.2d at 423. *See also Occidental Fire & Cas. Co. of North Carolina v. Stevenson*, 370 So.2d 1211 (Fla.Dist.Ct.App.1979), and 3 C.J.S. *Agency* § 322 (1973).

In *Pittman v. Home Indemnity Co.*, 411 So.2d 87 (Miss.1982), agency is question for jury.

We are of the opinion that, after thoroughly considering the entire record, the issue of liability for refusal to pay the Wesson claim and for refusal to furnish legal representation to Corporate Planning and Wimberly, were issues of liability properly submitted to the jury.

B.

EXCLUSION OF PROOF OF AGENCY

MONY claims that the lower court committed error in not allowing MONY to introduce documents, which reflected administrative services performed by Corporate Planning and Wimberly for the Surgical Clinic during the period from 1973 to 1980, specifically relating to procuring and servicing of other life insurance policies through the plan. Counsel for Corporate Planning and Wimberly offered to stipulate that they were agents for the Surgical Clinic for administrating the particular plan involved from 1974 through 1980, when they were terminated by MONY. The lower court restricted the evidence to that particular plan.

In the case sub judice, there is no issue as to whether Corporate Planning and Wimberly were agents of Surgical Clinic or MONY. Actually, Corporate Planning and Wimberly held a position of dual agency. The issue before the Court was whether or not Corporate Planning and Wimberly were acting as agents of MONY in relation to their acts regarding the MONY life insurance policy or if they were acting outside the scope of that agency status. MONY cites *Luke Constr. Co. v. Jernigan*, 252 Miss. 9, 172 So.2d 392 (1965), which held that certificates of insurance were indicative of a course of conduct which was competent evidence on the issue of whether or not Jones was the agent of Luke or was an independent contractor. That question was not before the lower court.

The contention is rejected.

C.

EXCESSIVE AWARD OF ACTUAL DAMAGES; EVIDENTIARY RULINGS ON PROOF OF DAMAGES

MONY argues on this assigned error that the testimony of Dr. Charles Dennis, who qualified as an imminent economist, was total and complete speculation. His expertise in economic loss due to business damage or injury was completely established. He testified as to his method of calculating the future lost profits of Corporate Planning. Although Dr. Dennis' method is not a guaranteed exact measurement, it was probably the best yardstick and rule that could have been presented. Decisions in other jurisdictions upheld the method employed by Dr. Dennis. *Sinclair Ref. Co. v. Gutowski*, 195 F.2d 637 (6th Cir.1952); *Lucky Auto Supply v. Turner*, 244 Cal.App. 2d 872, 53 Cal.Rptr. 628 (1966); *Chung v. Kaonohi Center Co.*, 62 Haw. 594, 618 P.2d 283 (1980); *Leoni* v. *Bemis Co.*, 255 N.W.2d 824 (Minn.1977); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978); *Wilko of Nashua, Inc. v. Tap Realty, Inc.*, 117 N.H. 843, 379 A.2d 798 (1977); *Smith Development Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203, 308 A.2d 477 (1973).

In *Nichols v. Stacks*, 485 So.2d 1034 (Miss.1986), the Court discussed a similar question of damages:

> In *Merritt v. Dueitt*, 455 So.2d 792, 793 (Miss. 1984), we stated:
>
> > The rule that damages, if uncertain, cannot be recovered applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent recovery.
>
> In *Cain v. Mid-South Pump Co.*, 458 So.2d 1048, 1050 (Miss.1984), Justice Prather, speaking for this Court, further refined this rule in stating:

> . . . [W]here it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages. This view has *been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof.* Under such circumstances, all that can be required is that the evidence—with such certainty as the nature of the particular case may permit—lay a foundation which will enable the trier of facts *to make a fair and reasonable estimate* of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss. [Emphasis added].

As noted in *Cain*, and emphasized in *Thomas v. Global Boat Builders & Repairmen, Inc.*, 482 So.2d 1112 (Miss.1986), a plaintiff under this rule cannot ignore information, methods and procedures available to him whereby he can accurately prove the amount of monetary damages and make a jury issue simply by testimony that he did suffer property damage. On the other hand, a plaintiff who has unquestionably suffered a pecuniary loss, and has produced the best evidence available to him, should not be denied recovery because the amount cannot be ascertained with the same precision as an ordinary claim for damages. Under these circumstances he is only required to put on sufficient proof to enable the fact finder to reach a fair and reasonable estimate of the damages.

485 So.2d at 1038.

Testimony from Caleb Dortch, MONY's Mississippi executive, indicated that wrongful acts asserted and proved against MONY could damage the reputation of Corporate Planning, its agent. Mr. Matt Ballew, a Corporate Planning stockholder, and Wimberly, testified that their business relies on referrals from professionals such as doctors, lawyers and accountants, and that their reputation is critical to obtain these referrals. Stephen Stewart, a partner at Moore & Powell, C.P.A., on the Mississippi Gulf Coast, testified that he has not in the recent past referred any potential client to Corporate Planning due to the circumstances in which Corporate Planning and MONY were involved. Such testimony was an indication of future profits unrealized by Corporate Planning due to its damaged reputation caused by MONY's wrongful refusal to pay the Wesson death claim.

MONY asserts that Instruction No. 11, which stated in part: "Such damages may include damages from mental anguish or emotional distress that W.A. Wimberly has suffered or is reasonably certain to suffer in the future, as a proximate result of MONY's wrongful conduct, if any you find pursuant to the instructions of the Court," was error. It cites *Sears, Roebuck & Co. v. Devers*, 405 So.2d 898 (Miss.1981), wherein the Court held that in the absence of physical injury, damages for mental distress are not appropriate unless the cause was attended by such acts that would ordinarily warrant a punitive damage instruction. Corporate Planning and Wimberly argue that *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So.2d 481 (Miss.1972) supports the jury instruction here. The *Eshee* Court held that the giving of a similar instruction which included the word "negligence" instead of "fraud or wrongful acts" did not require reversal, citing Miss.Supp.Ct. Rule 11.

Without considering mental anguish, the testimony indicated Corporate Planning and Wimberly sustained approximately five hundred thirty-seven thousand seven hundred forty dollars ($537,740) in actual damages, with

one hundred seventy-five thousand dollars ($175,000) loss of existing business and attorney's fees uncontradicted. The jury verdict was for $350,000 actual damages, with no award for punitive damages.

This assignment of error is rejected.

D.

USE OF ADKINS' DEPOSITION

MONY asserts that it was prejudicial error for the trial court to admit into evidence the deposition of Dr. Adkins, since it was denied the right to cross-examine him with regard to testimony given at the trial, and since Corporate Planning and Wimberly failed to exercise due diligence in procuring Dr. Adkins' attendance. MONY claims that the effort supplied by Corporate Planning and Wimberly in finding and serving Dr. Adkins is woefully short of the due diligence required to be shown before the trial court is allowed to use a deposition in his stead.

The record reflects that Dr. Adkins' office was located about twenty (20) miles from the courthouse. Only one attempt was made to serve Dr. Adkins, at which time he was in surgery. In response to MONY's objection to the deposition, the lower court allowed the deposition's use as a special circumstance since Dr. Adkins was a surgeon. The Miss.R.Civ.Proc. Rule 32(a)(3)(D) provides:

> (a) *Use of Depositions.* At the trial or upon the hearing of a motion of an interlocutory proceeding, any part or all or [sic] a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> * * * *

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

We have not been cited to a Mississippi decision addressing Rule 32(a)(3)(D). In *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir.1986), the United States Court of Appeals for the Seventh Circuit held that admission of deposition testimony is within the sound discretion of the trial court. However, that court noted that the trial judge was satisfied due diligence was met. *Rascon, supra.*

The lower court, in the case sub judice, responding to MONY's argument as to the lack of due diligence by Corporate Planning and Wimberly, stated: "Of course I know ordinarily it wouldn't be, but when you have doctors and surgeons and all, I think we ought to bend the rule and try to use depositions when we can where they are involved." The lower court did not find that Corporate Planning and Wimberly were diligent in attempting to procure the presence of Dr. Adkins. However, the argument and brief of MONY did not inform or indicate to this Court any benefit it would have received from Dr. Adkins's presence, nor does MONY state

how it was prejudiced by the use of the deposition. We note that MONY was the party originally initiating the taking of Dr. Adkins' deposition, and that MONY questioned him extensively. Therefore, we are of the opinion that in the absence of prejudice, failure to procure the presence of Dr. Adkins at trial does not constitute reversible error. Miss.Sup.Ct. Rule 11.

AFFIRMED ON CONDITION OF REMITTITUR.

HAWKINS, P.J., and PRATHER and GRIFFIN, J.J., concur.

DAN M. LEE, P.J., and ANDERSON and SULLIVAN, JJ., dissent.

ROBERTSON, J., dissents by separate opinion.

ZUCCARO, J., not participating.

ROBERTSON, Justice, dissenting:

If the matters discussed in the opinion of the Court were all that were involved today, I would assent. For better or for worse, there is more. Indeed, cases of this sort have been taken from our hands altogether.

Pilot Life Insurance Company v. Dedeaux, 481 U.S. ——, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), is the thief. In that case the Supreme Court on April 6, 1987, held that Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, et seq., preempted state common law actions charging an insurer's improper processing of an employee's claim for benefits under an insured employee benefit plan. As the plan under which the present action has been brought lies well within ERISA's coverage, we are bound to stay our hand. *See* U.S. Const. Art. VI, cl. 2 (1787).

To be sure, Mutual of New York did not plead preemption nor assign its denial as error. The point was not mentioned until *Pilot Life* was decided and Mutual of New York's counsel wrote us to that effect. No matter.

ERISA provides nothing less than that the courts of this state have no authority over cases of this sort. Where a matter is federally preempted, the parties may not by agreement or waiver confer upon us authority to decide it. *See International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

I would reverse and render.

ZUCCARO, J., not participating.

ANDERSON, Justice, dissenting.

This is a classic example of a difficult case creating bad law.

First, I note that I am in agreement with the majority in finding MONY's conduct and practices intentional and detrimental, not only to the plaintiffs here involved but to other policyholders as well and that it warranted an award of punitive damages. But having considered these facts and the applicable law in this case, I cannot agree that the punitive damage award assessed by the jury was so excessive as to require remittitur.

The majority notes that the jury award of $8 million was 92 times the amount of actual damages. Some states have limited the recovery of punitive damages to a specified proportion of actual damages. However, I must point out that this is not the standard employed by this Court and consideration of proportionality rather than net worth is error.

A summary of the general factors to be considered in awarding damages is outlined in *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.3d 254 (Miss.1985).

> With regard to punitive damages, our rules are necessarily general. Once it is established that punitive damages in some amount should be allowed, the quantum thereof is determined by reference to certain general factors which include:

(1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future. *Standard Life Co. of Indiana v. Veal*, 354 So.2d 239, 249 (Miss.1977). [sic]

(2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses. *Reserve Life Insurance Co. v. McGee*, 444 So.2d 803, 808 (Miss.1983); *T.C.L. Inc. v. LaCoste*, 431 So.2d 918, 923 (Miss.1983); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 460 (Miss. 1983); *Snowden v. Osborne*, 269 So.2d 858, 860 (Miss.1972); and

(3) The pecuniary ability or financial worth of the defendant, *Collins v. Black*, 380 So.2d 241, 244 (Miss.1980); *Standard Life Co. of Indiana v. Veal*, 354 So.2d 239, 249 (Miss.1977); *Allen v. Ritter*, 235 So.2d 253, 256 (Miss.1970); *Jones v. Carter*, 192 Miss. 603, 610, 7 So.2d 519 (1942). 483 So.2d at 278.

In *Crenshaw* the Court found the insurer provided no arguable defense in its failure to pay on a policy. The Court held that in light of the insurer's conduct and ability to pay, a punitive damage award of $1.6 million was not excessive.

MONY's financial statement for 1982 disclosed total assets in the amount of $8,754,357,835 and net worth in the amount of $447,934,890. The $8,000,000 punitive damages award represented approximately 1.785% of MONY's net worth. The new court-substituted award of $1.5 million equals only .33487% of the appellant's net worth.

The majority is establishing a precedent here with which every other punitive damage case coming before this Court must comply. That precedent or standard, an-

nounced herein is that a defendant, however obstinate and reprehensible his conduct, can victimize others and engage in such conduct with full assurance under this case that his monetary punishment will be much less than 1% of his net worth. A party with a net worth of $100,000 can feel free to abuse others with the knowledge that this Court will require a penalty of no more than $1,000. This is not a message I care to join in sending.

We recognize the fact that this Court has never before affirmed a punitive damage award of this magnitude. That is no basis for disallowing recovery in a proper case. *Tetuan v. A.H. Robbins*, 738 P.2d 1210, 241 Kan. 441 (1987); ($7.5 million award in punitive damages); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex.App. Corpus Christi 1986); (awarded $10 million in punitive damages); *Downey Savings & Loan Assoc. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987), ($5 million award in punitive damages representing 1.9% of the defendant company's net worth).

In previous cases where the award of punitive damages has been considered by this court to be excessive, the practice has been to reverse and remand—not substitute judgment. *Snowden v. Osborne*, 269 So.2d 858 (Miss. 1972); *First American National Bank of Iuka v. Mitchell*, 359 So.2d 1376 (Miss.1978).

Snowden, supra, relied in its decision on *Yazoo and Mississippi Valley RR Co. v. Williams*, 87 Miss. 344, 39 So. 489 (1905):

> . . . It is the long settled and uniformly adhered to rule in our jurisprudence that the amount of such punitory or exemplary damages is solely within the discretion of the jury, and, no matter what the sum of their finding might be, interference therewith, unless for exceptional causes, is discouraged . . . the reason being that, as the jury are the sole judges of the amount which ought properly to be assessed in

> order to inflict adequate punishment, the courts should scrupuously [sic] avoid any undue interference with their prerogative. . . .
>
> (87 Miss. at 355-356, 39 So. at 491).

The Court went on to explain a difference in the rule obtaining in actions for compensatory and punitory damages. In an action for compensatory damages, the jury is confined or restricted to consideration of the facts in evidence which serves as a guide or admeasurement of the damages actually sustained as shown by the proof. The existence of certain elements may be shown in proof to assist the jury in a determination of an amount which will fairly recompense or make the injured whole.

However, in punitive damage cases, the jury does not have as clear a guideline by which to determine the amount necessary to adequately punish the wrongdoer, protect the public and deter such future conduct. Such awards are most properly submitted to the "discretion, sound judgment and combined wisdom of jurors drawn indiscriminately from every walk of life."

Recently, in *Mississippi Farm Bureau Mut. Ins. Co. v. Todd*, 492 So.2d 919, 935 (Miss.1986), this Court affirmed a punitive damages award of $250,000 arising out of a bad faith insurance action. The Court most aptly stated: "Insurance consumers in Mississippi are entitled to protection from such practices, and here that protection was provided at the hands of the jury." Likewise, in the case at bar, the jury had an opportunity to examine the wrongdoing and its harmful effect upon the individual litigant and the public, to consider the financial ability of the wrongdoer and to assess a sum certain to effectuate the goals of punishment, deterance and rewards to those bringing the wrongdoer into account. *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239 (Miss.1977); *Employers Mutual Casualty Co. v. Tompkins*, 490 So.2d 897 (Miss.1986).

I am of the opinion that the jury fully and fairly considered all the factors necessary in assessing the award. This award, although high, is not disproportionate to the transgression involved in this case and the financial ability of the appellant to pay. This Court is not authorized to disturb a jury verdict regarding the amount of damages because it "seems too high, or seems too low." *Toyota Motor Co., Ltd., v. Sanford*, 375 So.2d 1036, 1037 (Miss.1979).

It is well established that this Court has authority to enter a remittitur both by statute and by caselaw. My contention is that because we can do so does not necessarily mean that we should. It is more properly the function of the jury.

I do not feel it appropriate for this Court to get into the business of regulating punitive damages. More problems are created than resolved as this case today becomes the yardstick by which future punitive damage cases must be measured. For these reasons, I respectfully dissent.

DAN M. LEE, P.J., and SULLIVAN, J., join this dissent.

APPENDIX B

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSISSIPPI

Cause No. 12,008

THE ESTATE OF RAY LAMAR WESSON, M.D., by and through IMOGENE HALL, Administrator [sic] and Guardian of RAY LAMAR WESSON, JR., ALLISON WESSON, DAVE NEWTON WESSON, and JASON MANNING WESSON, Minors,

Plaintiffs

versus

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, CORPORATE PLANNING, LTD. and W. A. WIMBERLY,

Defendants

JUDGMENT

THIS DAY this case came on to be heard in the above styled and numbered cause before twelve good and lawful jurors of Jackson County, Mississippi, to-wit: Larry Grant Rogers and eleven others, who, being first accepted by the parties, were sworn and impanelled, and after hearing the testimony of the witnesses, and all the evidence, and after full consideration, returned the following verdict.

> "We, the jury, find for the Plaintiffs and assess actual damages in the sum of $87,136.00 and punitive damages in the sum of $8 million ($8,000,000.00)."

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs do have and recover judgment of, from, and against the Defendant, The Mutual Life Insurance Company of New York in the sum of $87,136.00 as com-

pensatory damages and the sum of Eight Million Dollars ($8,000,000.00) as punitive damages, together with lawful rate of interest thereon until paid and together with all costs taxed in this cause.

For all of which let all proper process and execution issue.

SO ORDERED AND ADJUDGED This the 14th day of February, 1984.

/s/ Marion M. Margoles
Circuit Court Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the term of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respct[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator (1) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or beneficiary, or (2) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the

[1] So in original. Probably should be "respect".

requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(As amended Pub.L. 99-272, Title X, § 10002(b), Apr. 7, 1986, 100 Stat. 231.)

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena [sic], or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after the receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have

concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the

amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such

manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975 (f) (5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975 (e) (1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518 (a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has it principal office, or in the United States District Court for the District of Columbia.

(Pub.L. 93-406, Title I, § 502, Sept. 2, 1974, 88 Stat. 891; Pub.L. 96-364, Title III, § 306 (b), Sept. 26, 1980, 94 Stat. 1295.)

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under

the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participlan whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

(Pub.L. 93-406, Title I, § 503, Sept. 2, 1974, 88 Stat 893.)

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for pur-

poses of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement

and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer wel-

fare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act.

(As amended Pub.L. 99-272, Title IX, § 9503(d)(1), Apr. 7, 1986, 100 Stat. 207.)

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Co-

lumbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

(Pub.L. 93-406, Title I, § 514, Sept. 2, 1974, 88 Stat. 897; Pub.L. 97-473, Title III, §§ 301(a), 302(b), Jan. 14, 1983, 96 Stat. 2611, 2613; Pub.L. 98-397, Title I, § 104(b), Aug. 23, 1984, 98 Stat. 1436.)

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance:

Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.

SUBCHAPTER G—ADMINISTRATION AND ENFORCEMENT UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

Sec.

AUTHORITY: Secs. 102, 502(b)(2), 503, 505, Pub. L. 93-406, 88 Stat. 829, 891, 893, 894 (29 U.S.C. 1132(b)(2), 1133, 1135); Secretary of Labor's Order No. 76-13.

§ 2560.502-1 Requests for enforcement pursuant to section 502(b)(2).

(a) *Form, content and filing.* All requests by participants, beneficiaries, and fiduciaries for the Secretary of Labor to exercise his enforcement authority pursuant to section 502(a)(5), 29 U.S.C. 1132(a)(5), with respect to a violation of, or the enforcement of, parts 2 and 3

of Title I of the Employee Retirement Income Security Act of 1974 (the Act) shall be in writing and shall contain information sufficient to form a basis for identifying the participant, beneficiary, or fiduciary and the plan involved. All such requests shall be considered filed if they are directed to and received by any office or official of the Department of Labor or referred to and received by any such office or official by any party to whom such writing is directed.

(b) *Consideration.* The Secretary of Labor retains discretion to determine whether any enforcement proceeding should be commenced in the case of any request received pursuant to paragraph (a) of this section, and he may, but shall not be required to, exercise his authority pursuant to section 502(a)(5) of the Act only if he determines that such violation affects, or such enforcement is necessary to protect claims of participants or beneficiaries to benefits under the plan.

[43 FR 50175, Oct. 27, 1978]

§ 2650.503-1 Claims procedure.

(a) *Scope and purpose.* (1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as "claims procedures." Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

(b) *Obligation to establish a reasonable claims procedure.* Every employee benefit plan shall establish and maintain reasonable claims procedures.

(1) A claims procedure will be deemed to be reasonable only if it:

(i) Complies with the provisions of paragraphs (d) through (h) of this section, except to the extent that it is deemed to comply with some or all of such provisions under the authority of paragraph (b)(2) or paragraph (j) of this section.

(ii) Is described in the summary plan description, as required by § 2520.102-3,

(iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims, and

(iv) Provides for informing participants in writing, in a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and paragraph (h) of this section.

(2) In the case of a plan established and maintained pursuant to a collective bargaining agreement (other than a plan subject to the provisions of section 302(c)(5) of the Labor Management Relations Act, 1947 concerning joint representation on the board of trustees):

(i) Such plan will be deemed to comply with the provisions of paragraphs (d) through (h) of this section if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference.

(A) Provisions concerning the filing of benefit claims and the initial disposition of benefit claims, and

(B) A grievance and arbitration procedure to which denied claims are subject.

(ii) Such plan will be deemed to comply with the provisions of paragraphs (g) and (h) of this section (but will not be deemed to comply with paragraphs (d) through (f)) if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference a grievance

and arbitration procedure to which denied claims are subject (but not provisions concerning the final and initial disposition of benefit claims).

(c) *Claims procedure for an insured welfare or pension plan.* (1) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for filing of a claim for benefits with and notice of decision by such company, service or organization.

(2) See paragraph (g) regarding review and final decision on denied claims by insurance companies, insurance services and similar organizations.

(d) *Filing of a claim for benefits.* For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

(2) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily have been referred.

(3) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization, which is subject to regulation under the insurance laws of one or more States, the person or organizational unit which handles claims for benefits under the plan or any officer of the insurance company, insurance service, or similar organization.

(4) For purposes of paragraphs (d) (1), (2), and (3) of this section, a communication shall be deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

(e) *Notification to claimant of decision.* (1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e) (1) of this section within a reasonable period of time, the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.

(3) For purposes of paragraphs (e) (1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan, unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

(f) *Content of notice.* A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

(1) The specific reason or reasons for the denial;

(2) Specific reference to pertinent plan provisions on which the denial is based;

(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

(g) *Review procedure.* (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure

pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which is the subject of the claim and to other attendant circumstances. In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

(h) *Decision on review.* (1) (i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case,

a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

(i) *Apprenticeship plans.* This section does not apply to employee benefit plans which provide solely apprenticeship training benefits.

(j) *Qualified Health Maintenance Organizations.* Claims procedures with respect to any benefits provided through membership in a qualified health maintenance organization, as defined in section 1310(d) of the Public Health Service Act, as amended, 42 U.S.C. 300e-9(d), shall be deemed to satisfy the requirements of this section with respect to the provision of such benefits to persons who are members of such qualified health maintenance organization, provided those procedures meet the requirements of section 1301 of the Public Health Serv-

ice Act, as amended 42 U.S.C. 300e and the regulations thereunder.

(Approved by the Office of Management and Budget under control number 1210-0053)

[42 FR 27426, May 27, 1977, as amended at 46 FR 5884, Jan. 21, 1981; 49 FR 18295, Apr. 30, 1984]

APPENDIX D

EXCERPTS FROM TRIAL RECORD

* * * *

[578] BY MR. MINOR: No, I will go over and make copies—The Judge has ordered you to do something. I will go over and make them myself right now.

BY THE COURT: Where is the Clerk at? You can go downstairs in the Circuit Clerk's Office and make copies right now. We will sit here until it is done.

(Whereupon Court was recessed for the night.)

THURSDAY

FEBRUARY 2, 1984

(IN OPEN COURT IN THE ABSENCE OF THE JURY THE FOLLOWING PROCEEDINGS WERE HAD:)

BY MR. MINOR: Let me try to make a motion to put the issue before the Court as to where we are going on this. The Plaintiff moves for the Court to rule irrelevant and hence inadmissable any examination of Mr. Wimberly about his so-called agency relationship with Dr. Wesson, and specifically using the course of dealings such as insurance, etcetera, etcetera, on the grounds that we have admitted he is an agent of ours for certain purposes. He is also an agent for Mutual of New York for other purposes, and it is really not an issue in the case. In any event, even if for the sake of argument Mr. Wimberly was the sole and exclusive agent of Dr. Wesson, which obviously he is not, for selling [579] insurance, but just assume he was. It is irrelevant to the issues of this lawsuit because MONY is the one that denied payment on the policy and breached the contract. And Wimberly's relevance would only be if he intervened or superseded that and, of course, he is not the sole proximate cause.

BY THE COURT: I think, though, what he is trying to show is the issue of whether or not he was their agent—whether he was MONY's agent. I think he has a right to show that and maybe his other business transactions, other dealings. Now, I have ruled, and I think I'm pretty plain on that. And it is due to my prior ruling that I didn't want him to go into, before the Jury—but I will let him make a record on it—any other insurance policies and dealings that the Wesson folks had with any other company. Now, do you understand? But as far as showing this man's relationship in other businesses, I think that's—

BY MR. MINOR: —We agree, Your Honor. In terms of him showing the agency relationship between himself—that's Wimberly—and Mutual of New York, sure, he has a full right to go into that.

BY THE COURT: I ought not to do it because you all have already let it in and let the Jury hear it, but I'm going to.

* * * *

[698] DEFENDANT'S EXHIBIT NO. BH FOR IDENTIFICATION: RESOLUTION OF THE DIRECTORS OF THE SURGICAL CLINIC, DATED FEBRUARY 1, 1976.

(See under separate cover.)

* * * *

[832] BY MR. MINOR: Do I need to read Paragraph 21 which says when they did it they were acting in the capacity as an agent for Mutual of New York?

BY THE COURT: Gentlemen, I'm going to sustain your motion in this case. I don't think it is relevant.

BY MR. MINOR: Judge, let me just say for the record the Plaintiffs again are willing to stipulate that Wimberly and Corporate Planning were agents of the Surgical Clinic, P.A. in '74 to '80 for matters relating to the administration of the pension and profit sharing plan and for performance of certain management services. We are willing to stipulate to that.

BY MR. CARAWAY: I'm not in the stipulating mood, Judge.

BY THE COURT: I know that.

* * * *

TESTIMONY OF W. A. WIMBERLY

[846] BY MR. CARAWAY:

Q What you did in '72, you incorporated the corporation Corporate Planning, did you not?

A Yes, sir.

Q And then in 1973 you formed another corporation which was Corporate Investments?

A Yes, sir.

Q Why did you form the second company?

A Well, Corporate Planning would be the consulting company that would administer the retirement plans, and Corporate Investments would be the company that would sell and service and receive commissions from insurance products.

Q So you had Corporate Planning as your administrative corporation and Corporate Investments as your sales company?

A Sales and service; yes, sir.

Q All right. Now, sometime in late '73 a doctor friend of yours gave you the name of Dr. Wesson and Dr. Adkins, did they not?

A Yes sir, Dr. Wesson in particular.

Q And you called on them and tried to sell him on the concept of forming a corporation and setting up tax qualified corporation and a tax qualified plan to be approved by I.R.S. where they could fund a retirement insurance, life insurance, disability insurance, and group insurance, and also some investments, didn't you?

A Investments—mainly the first part. We didn't talk too much about investments. The rest of it, yes sir.

[847] Q Well, you could under this have some mutual funds; you could have a split thing, couldn't you?

A It's similar probably, but everybody has in their own retirement plans and group insurance and health insurance.

Q What all was available in your concept that you could sell as you went to call on two doctors who were successful practitioners and you could show them to deaden tax advantages? What all could they do?

A You named it a minute ago.

Q All right. That is they could buy life insurance; is that right?

A Yes, sir.

Q And they could deduct those premiums?

A Some they could and some they couldn't; yes, sir.

Q They could buy disability insurance and deduct those premiums?

A Yes, sir.

Q They could deduct that off their income tax?

A Yes, sir.

Q They could buy health insurance and deduct that, could they not?

A Yes, sir.

Q All right, what about dental? I believe you set them up on a dental plan, didn't you?

BY MR. MINOR: Your Honor, I object to this on the grounds of relevancy.

* * * *

TESTIMONY OF MATT BALLEW, III

[1224] MR. MATT BALLEW, III, was thereupon called to the stand as a witness by counsel and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Would you state your name?

A My name is Matt Ballew.

Q Where do you live, Mr. Ballew?

A I live in Jackson, Mississippi at 2363 Wild Valley Drive.

Q And where are you employed, sir?

A I'm employed at Corporate Planning.

Q Relate briefly to the Jury, Mr. Ballew, your educational background?

A I'm a C.P.A. and Attorney, and I have a Masters in Tax.

BY THE COURT: A Masters in what?

BY THE WITNESS: Taxation.

BY MR. DAVIS:

Q Relate briefly, Mr. Ballew, your employment background?

A Okay. I have worked at Deposit Guaranty National Bank in the Trust Department for two years. I worked for a national accounting firm in Jackson, Mississippi for two years. I practiced law for seven years in the field of taxation. Subsequent to that, I joined Corporate Planning.

Q And when did you join Corporate Planning?

A It was in November of '78.

* * * *

[1278] Q And is that the agreement that was being referred to in those Minutes you looked at just a minute ago; the Corporate Investment Minutes?

A I don't know that.

Q What is the date of the agreement you are looking at?

A 2nd day of April, 1974.

Q Okay. Now, we were looking here at the Minutes of the Directors of Corporate Investments and it refers to the agreement as done during the fiscal year '74, which was reduced to writing in contract and attached to the Minutes between this corporation, which is Corporate Investments, Ltd., and Corporate Planning, Ltd. And it says it was unanimously agreed to continue such contract to the fiscal year. Now, aren't they referring to the same agreement?

A I do not know. It would appear they are.

Q Now, Matt, when did you first get involved with the Surgical Clinic?

A I can't say specifically. It was sometime in 1979 I called on the Surgical Clinic of Biloxi with Andy. Early '79. I'm not sure when.

Q Well now, you did some work in connection with Surgical Clinic through Andy prior to that time, didn't you?

A Yes. When I was practicing law, I brought their retirement plan in compliance with ERISA in 1976.

Q But you had also had contact with Andy before that time, had you not? I mean, you were working with him in connection with this plan administration business he was working on; right?

[1279] A No. Andy employed me as legal counsel to bring all his client's plans into compliance with the law passed in 1974, which had to be done by I believe the end of 1976. I really never even talked to any of his clients. I just was representing him.

Q Did you ever do any work through Andy for Corporate Planning prior to the time that you were hired to bring those plans into compliance with ERISA? And you can explain to us what ERISA means?

A ERISA is a law that was passed in 1974 that tightened what an employer could do with a retirement plan. Basically, it tried to eliminate discrimination by the employer against the employee, and required that everybody that had a retirement plan restate the plan and re-submit it to the Internal Revenue Service for approval.

Q Okay. Prior to the time that Andy hired you to do all this, did you ever do anything else for Andy?

A I don't know frankly.

Q Okay. I'm going to show you what has been marked for identification here as Defendant's Exhibits L and M and ask you if you recognize those?

A No.

Q You have never seen those before?
A No.
Q Have you ever prepared a document similar to those?
A Yes.
Q Isn't it a fact that you prepared what they call a prototype plan for Andy to use in Corporate Planning?
A No. I prepared what would have to be classified as an individual drawing plan.
[1280] Q I understand Mr. Wimberly's testimony the other day to be that he had hired you to draft that prototype plan and used it for all these various clients. Is that not correct?
A A prototype plan is submitted to the National Office of the Internal Revenue Service for approval. And the plan document that I prepared for Andy in '76 was submitted to the I.R.S. at the local level and was not technically qualified as a prototype plan.
Q Okay. So you had nothing to do with the preparation of a plan that was similar to these or that was later utilized by Andy in the course of his business?
A As a prototype, no.
Q Well, or anything similar to those. One of these is a profit sharing plan and trust agreement, and one is a pension trust agreement.
BY MR. DAVIS: Your Honor, let me enter an objection to relevancy. For the life of me, I cannot see how what Mr. Ballew did in preparing this plan has anything to do with the lawsuit.
BY THE COURT: I sustain it.

BY MR. GAMBLIN:

Q Matt, you referred to Andy hiring you to bring some plans into compliance with ERISA in '76?
A Yes.
Q I'm going to hand you what's been marked for identification as Exhibit BM and ask you if you recognize that?

BY MR. DAVIS: May I see it? (Looking at document) I don't see how that's relevant, Your Honor.

* * * *

[1282] BY MR. MINOR: It is totally irrelevant, Your Honor. It's just wasting the Jury's time.

BY THE COURT: What difference does that make?

BY MR. GAMBLIN: I'm trying to show what the relationship with insurance was.

BY THE COURT: The relationship with insurance?

BY MR. GAMBLIN: Yes, sir.

BY THE COURT: What insurance? MONY's insurance?

BY MR. GAMBLIN: Yes, sir.

BY THE COURT: I will sustain the objection.

BY MR. GAMBLIN:

Q Okay, Matt, wouldn't it be a fair statement to say based on what you know about the services that Corporate Planning provided to Dr. Wesson and Dr. Adkins and the Surgical Clinic of Biloxi as a whole, the whole point of it was to save them tax dollars?

A Uh, the whole point of the retirement plan was to save them tax dollars.

Q Okay. The whole point of the concept that was sold to those doctors and the way that things were carried out was to save tax dollars, wasn't it? I mean they went down there and they incorporated, adopted pension plans, profit sharing plans, and that sort of thing; that is all devices that can be utilized to save tax dollars, isn't it?

A That's right.

Q And—

* * * *

TESTIMONY OF ANDREW G. WATSON

[2220] BY THE COURT: That's all right. You should do it.

BY MR. MINOR: The witness is not qualified by training, education and experience. The question is remote in time. What they might do today or tomorrow is

irrelevant to the bad faith committed when this claim was denied in 1980. It is irrelevant to the issues of whether MONY legally honored the contract. They could have a thousand procedures. More specifically, though, the witness does not have a sufficient basis to formulate an opinion nor has there been a sufficient basis disclosed. And according to an article written by Mr. Caraway under expert opinion testimony in a Mississippi Law Journal several years ago, he must have personal knowledge. And he doesn't; it is all hearsay.

BY THE COURT: I thought a more recent decision of our Court qualified him as being in distance from home and the type of luggage, wasn't it? He certainly meets that criteria. (Joking) Anyway, I will overrule it and let him answer.

BY MR. GAMBLIN:

Q Mr. Watson, have you done some research into this problem?

A Yes, I have.

Q Would you tell the Jury what things you have researched? What type of research you have conducted into the question of the advisability of an automatic premium loan provision in a Pension Trust Policy in say 1973 to [2221] '74?

Q I have reviewed the portions of the Internal Revenue Code, the regulations issued by the I.R.S., various revenue rulings, and also publications by the I.R.S.

Q Are these materials you have reviewed standard nationwide? We are talking about the Internal Revenue Code here. Is that applicable to Pension Plans regardless of the location in the United States?

A Yes, it is.

Q Do you have an opinion based upon your research, your education, and your experience in the field as to the advisability of having an automatic premium loan provision in a Pension Trust Policy in 1973 or '74?

BY MR. MINOR: Your Honor, same objection. We don't know what he is basing his opinion on. Now he is talking about '73 or '74. I thought he was talking about now. And that may not be quite as objectionable, but now he is getting back to '73 and '74. The question is irrelevant. The advisability has nothing to do with this lawsuit, Judge.

BY THE COURT: I know. I'm going to let him go ahead. Go ahead.

BY MR. GAMBLIN:

Q Okay. What is that opinion, Mr. Watson?

A My opinion is that it is not advisable to have APL under a policy used in connection with a corporate tax qualified plan because the use of that APL might under certain circumstances result in a disqualification of the plan.

Q Would you explain to the Jury what you mean [2222] by disqualification?

Q Well, when a plan is established, the I.R.S. has set up a number of rules which it says if you follow these rules the I.R.S. will give you certain benefits. One of those benefits is that the employer gets to deduct the contributions to the plan on his tax return, and at the same time the amount that the employer contributes to the plan at that time is not taxable income to the employee. So when a plan becomes disqualified, what that means is that the contribution that the employer makes to the plan is no longer tax deductible, and the contribution that the employer makes would be taxable income to the employee.

Q Now, Mr. Watson, have you reviewed the Pension Trust Agreement that the Surgical Clinic of Biloxi, P.A., adopted?

A Yes.

Q Now, you were talking about disqualification. Tell the Jury who would have been the persons or entities

that would have been adversely affected by disqualification of the plan?

BY MR. MINOR: Your Honor, I'm going to object unless he can say it was reviewed back in March of 1980 and that there was some analysis done of the plan then with respect to handling the death claim. The fact that he looked at it in 1982 is irrelevant to anything that has happened before that.

BY MR. GAMBLIN: I disagree, Your Honor. I think it goes directly to the case that we are trying to put on here.

[2223] BY MR. MINOR: It is after the fact, Your Honor. It is an attempt to plug in the holes that they think they left.

BY THE COURT: Go ahead. Give your opinion.

BY THE WITNESS: Under that particular plan the parties that would have been adversely affected by its disqualification would have been the participants under the plan and also the employer, who in this case I believe were the two doctors.

BY MR. GAMBLIN:

Q All right. Now, you stated that the automatic premium loan provision's operation might potentially result in a disqualification. What types of legal authorities did you review in coming to that determination?

A I reviewed the Internal Revenue Code and the regulations under the Internal Revenue Code, the Revenue Rulings, and I.R.S. Publications.

Q Mr. Watson, I am going to hand you a document here and ask you if you can identify this document for the Jury, please?

A This document is a copy of Revenue Ruling 71-329.

Q And who is that issued by?

BY THE COURT: Have you seen this? Are you going to object to this?

BY MR. MINOR: Well, I object to it in terms of the basis of his opinion. They have furnished us copies of these before, so I don't object on that grounds, Your Honor.

DEFENDANT'S EXHIBIT
NO. BH

RESOLUTION OF THE DIRECTORS OF THE SURGICAL CLINIC OF BILOXI, P.A.

February 1, 1976

BE IT REMEMBERED that the Directors of The Surgical Clinic of Biloxi, P.A. took the following action without a meeting pursuant to Section 79-3-283 of the Mississippi Code of 1972, Annotated and recompiled.

RESOLVED that that certain Money Purchase Pension Plan adopted on the 1st day of February, 1974, is hereby amended in accordance with the provisions of Article VIII by way of substitution of a new plan which shall conform to the Pension Reform Act of 1974.

RESOLVED FURTHER that upon completion of the above reference amendment to the now existing Money Purchase Pension Plan the officers of The Surgical Clinic of Biloxi, P.A. shall cause said amendment to be submitted to the Internal Revenue Service for a determination of its exempt status.

This the *1st* day of February, 1976.

/s/ J. R. Adkins
Director

/s/ Ray L. Wesson, M.D.
Director

_____
Director

MONEY PURCHASE PENSION PLAN AND TRUST AGREEMENT

Effective as of February 1, 1974, The Surgical Clinic of Biloxi, P.A. adopted The Surgical Clinic of Biloxi, P.A. Money Purchase Pension Plan, and executed a trust agreement to enable its eligible employees to share in its profits.

The Plan was subsequently amended; and, effective as of February 1, 1976, the Company adopted the amended and restated Plan as set forth herein.

The Surgical Clinic of Biloxi, P.A. Money Purchase Pension Trust, which was established by trust agreement executed on February 1, 1974, was amended and restated as of February 1, 1976, and is intended to form a part of the Plan.

The Plan and Trust are intended to meet the requirements of Sections 401(a) and 501(a) of the Internal Revenue Code of 1954, as amended by the Employee Retirement Income Security Act of 1974.

The provisions of this Plan shall apply only to an Employee who terminates employment on or after the Effective Date. The rights and benefits, if any, of a former employee shall be determined in accordance with the prior provisions of the Plan in effect on the date his employment terminated.

PLAN

ARTICLE I

DEFINITIONS OF TERMS

I:1 The following words and terms as used in this Agreement shall have the meaning set forth below, unless a different meaning is clearly required by the context:

(a) "Employer": The Surgical Clinic of Biloxi, P.A. or any person, firm, or corporation

into which said Employer may be merged or consolidated or by which it may be succeeded and which may adopt this pension plan, or any subsidiary or affiliated company which may adopt this plan and trust.

(b) "Board": The present and any succeeding Board of Directors of the Employer.

(c) "Trustee" or "Trustees": Ray L. Wesson and Jerry R. Adkins acting as Trustee and any successor trustee or trustees. The singular form of trustee shall likewise be used herein to refer to both the singular and plural trustees.

(d) "Employee": Any person, including any officer, in the active and continuous employ of the Employer. A employee for the purpose of this Agreement, is one who is employed for 1,000 hours of service or more per year in the period of continuous employment required hereunder. For purposes of this Agreement, Employee shall not include any person who is included in a unit of employees covered by an agreement in which retirement benefits were the subject of good faith bargaining between employee representatives and the Employer.

(e) "Participant": Any Employee who has qualified under this Agreement, as provided by Article III entitled *Participation and Service.*

(f) "Compensation": Means the compensation within the meaning of Section 404(a)(3) of the Code, but not including the Company's contributions to the Trust or any profit sharing plan which the Company

may adopt. "Creditable Compensation" where used with reference to any Participant or Covered Employee, means the total Compensation (as above defined) paid to him by the Company in respect to its taxable year in question, (a) excluding

(i) Overtime

(ii) Discretionary bonuses not paid in accordance with a fixed formula or established pattern or scheme of compensation,

(iii) Compensation paid in kind,

(iv) Special allowances or reimbursements to cover expenses paid or incurred on behalf of the Company or in the course of employment with the Company (for example, but not by way of limitation, travel and entertainment expenses),

(v) The Company's contributions to any employee welfare or health insurance plan or arrangement, and

(vi) Any amount paid in excess of $100,000.00.

but nevertheless (b) including bonuses paid in accordance with a fixed formula or established pattern or scheme of compensation and other additional or percentage compensation of a similar character which is not excluded under (a) above.

(g) "Agreement": This Agreement with all amendments and supplements thereto.

(h) "Insurer": Means such legal reserve life insurance company or companies as shall issue any Contract which may be purchased pursuant to the Plan.

(i) "Normal Retirement Date": The normal retirement date of a Particant shall mean the first day of the calendar month coinciding with or next following the Participant's 65th birthday or, if later, the 10th anniversary of his entry into the Plan.

(j) "Early Retirement Date": The "early retirement date" of any participant means the first day of any month (prior to the normal retirement date) after the participant attains his or her 60th birthday.

(k) "Valuation Date": Valuation date shall mean the last day of the Plan and Trust Year and such other times as the Committee may deem necessary.

(l) "Effective Date": February 1, 1976, the date on which the provisions of this amended and restated Plan became effective.

(m) "Anniversary Date": Shall mean the 31st day of January each year.

(n) "One Year Break in Service": Shall mean the failure of a participant to complete more than 500 hours of service during a period of 12 consecutive months beginning at the date of participant's employment or any anniversary thereof.

(o) "Computation Period": Shall mean the 12 consecutive months period beginning on an employee's date of employment or any anniversary thereof, whichever is applicable.

(p) "Entry Date": Shall mean February 1, 1974, and February 1st of each year.

(q) "Normal Annuity Form": The Normal Annuity Form shall be a life retirement annuity which provides monthly payments to the Participant, the first payment becoming due on such Participant's retirement date, if he is then living, and subsequent payments of a like amount monthly thereafter during the lifetime of such Participant, terminating with the last payment due preceding the death of such Participant; provided, however, that if the death of such Participant shall occur after the first such monthly payment and before guaranteed monthly payments have been made, as determined by the policy provisions, will be paid to the beneficiary authorized to receive such payments.

A Joint and Survivor annuity, with the survivor annuity not less than half of the annuity payable to the Participant during the joint lives of the Participant and his spouse, will be provided those Participants who have been married for the one-year period ending on the annuity starting date. The amount of the joint and survivor annuity shall be that amount purchasable with the value of the life retirement annuity of the normal annuity form accrued and vested as of the annuity starting date. Such joint and survivor annuity shall apply unless the Participant elects otherwise prior to his annuity starting date.

(r) "Separate Investment Fund": The Separate Investment Fund shall consist of contributions to the trust together with the earnings and increments thereon, less (1) the amounts paid to the Insurer as pre-

miums on any life insurance contract or contracts on the lives of participants under the plan, and (2) any amount distributed in accordance with the terms of this Plan and Trust. Trust assets valuation shall be based on fair market value.

(s) "Participant's Account": Shall mean at any time the value of the Separate Investment Fund held for his benefit. The Participant's Account shall be segregated into sub-accounts to show (1) the amount thereof attributable to contributions by the Participant and (2) the amount thereof attributable to contributions by the Employer. Such other accounts shall be created by the Committee as it deems advisable.

(t) "Masculine Pronouns": The masculine pronouns used herein refer to both men and women unless the context indicates otherwise, and the singular form shall likewise be used to refer to both singular and plural pronouns.

(u) "Age": The age of an Employee on his birthday last preceding the date as of which determination of his age is being made.

(v) "Committee": Means the administrative committee appointed under Article III.

(w) "Continuous Employment": Shall mean an uninterrupted period of service with the Employer but shall include any authorized leave of absence provided that such leaves of absence are not granted in such a manner as to discriminate in favor of employees who are officers, shareholder-

ers, or highly compensated. For purposes of the participation requirement, a year of continuous employment shall mean a 12 month period, measured from the date when the employee enters such employment, during which he has worked at least 1,000 hours. For purposes of computing continuous service, pre-break and post-break service is to be taken into account for purposes of determining continuous service; provided, however, that if the employee has at least a 1 year break in service, in which he did not have over 500 hours of service with the Employer, he shall be required to complete 1 year of continuous service before being eligible to participate in the Plan, at which point his pre-break and post-break service is to be taken into account.

(x) "ERISA": Public Law No. 93-406, the Employee Retirement Income Security Act of 1974, as amended from time to time.

(y) "Fiduciaries": The Employer, the Committee and the Trustee, but only with respect to the specific responsibilities of each for Plan and Trust administration.

(z) "Years of Service": Shall mean any plan year which an employee has completed 1,000 hours of service with the Employer.

(aa) "Hours of Service": The term "Hour of Service" means, with respect to any Employee or Participant, each hour for which he is either directly or indirectly compensated by the Company for performing duties for the Company. In addition, an Employee or Participant will also be

credited with "Hour of Service" for any customary period of work, based on a forty-hour week or pro rata portion thereof, during which the Employee or Participant:

(a) is laid off for a temporary period (even if of indefinite duration);

(b) is on leave of absence; or

(c) is not working due to a labor-management dispute.

(bb) "Leave of Absence": A leave of absence shall be granted by the Company for service in the Armed Forces of the United States and jury duty. A leave of absence may be granted by the Company for sickness, accident, vacations, disability or other similar reasons under rules established by it and uniformly applied by it to all individuals similarly situated.

(cc) "Rollover Account": Shall mean any rollover account or rollover contribution defined in (i) Section 402(a)(5) or Section 403(a)(4) of the Internal Revenue Code (relating to certain lump sum distributions from an employee's trust or employee annuity described in Section 401(a) or 403(a) of the Internal Revenue Code or (ii) Section 408(d)(3) or the Internal Revenue Code (relating to certain distributions from an individual retirement account or an individual retirement annuity), or (iii) Section 409(b)(3)(C) of the Internal Revenue Code (relating to certain distributions from a retirement bond).

(dd) "Accrued Benefit": Shall mean the portion of each Participant's account as of any applicable date which represents the value of Employer contributions for years of plan participation in which contributions are made and forfeitures, if any, owing to those contributions.

(ee) "Limitation Year": Shall mean the plan year for the purposes of calculating the maximum contribution.

ARTICLE II

ADMINISTRATION

II:1 The Fiduciaries shall have only those specific powers, duties, responsibilities and obligations as are specifically given them under this Plan or the Trust. In general, the Employer shall have the sole responsibility for making the contributions, and shall have the sole authority to appoint and remove the Trustee members of the Committee and any Investment Manager which may be provided for under the Trust, and to amend or terminate, in whole or in part, this Plan or the Trust. The Committee shall have the sole responsibility for the administration of this Plan, which responsibility is specifically described in this Plan and the Trust. The Trustee shall have the sole responsibility for the administration of the Trust and the management of the assets held under the Trust, all as specifically provided in the Trust.

II:2 The Administrative Committee shall consist of three members appointed by and to hold office during the pleasure of the Board. The members of the Administrative Committee shall serve

without compensation, but shall be reimbursed for all expenses by the Employer.

II:3 The Committee shall elect a Chairman who shall be a member of the Committee, and a Secretary who may or may not be a member of the Committee and shall appoint such subcommittees as it shall deem necessary and appropriate. The Committee shall conduct its business and hold meetings as determined by it from time to time. A majority of the Committee shall have power to act, and the concurrence of any member may be by telephone, wire, cablegram, or letter. In the administration of the Plan, the Committee may:

(a) employ agent to carry out nonfiduciary and fiduciary responsibilities (other than trustee responsibilities as defined in Section 405(c)(3) of ERISA);

(b) consult with counsel, who may be of counsel to the Company;

(c) appoint an investment manager or managers (as defined in Section 3(38) of ERISA) to manage (including the power to acquire and dispose of) all or any part of the assets of the Plan; and

(d) provide for the allocation of fiduciary responsibilities (other than trustee responsibilities as defined in Section 405(c)(3) of ERISA) among its members. Actions dealing with fiduciary responsibilities shall be taken in writing and the performance of agents, counsel, and fiduciaries to whom fiduciary responsibilities have been delegated shall be reviewed periodically.

II:4 The Committee shall exercise such authority and responsibilities as it deems appropriate in order

to comply with ERISA and governmental regulations issued thereunder relating to records of Participant's Service, account balances and the percentage of such account balances which are nonforfeitable under the Plan; notifications to Participants' annual registration with the Internal Revenue Service, and annual reports to the Department of Labor.

II:5 The Committee shall administer the Plan and adopt such rules and regulations as in the opinion of the Committee are necessary or advisable to implement and administer the Plan and to transact its business. In performing their duties, the members of the Committee shall act solely in the interest of the Participants of the Plan and their beneficiaries and

(a) For the exclusive purpose of providing benefits to Participants and their beneficiaries;

(b) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and

(c) In accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of Title I of ERISA.

II:6 Pursuant to procedures established by the Committee, adequate notice in writing shall be provided to any Participant or beneficiary whose claims for benefits under the Plan has been denied. Such notice shall set forth the specific

reason for such denial, written in a manner calculated to be understood by the claimant, and provided review is requested within 60 days after receipt by the claimant of written notification of denial of his claim, shall afford a reasonable opportunity to any claimant whose claim for benefits has been denied to a full and fair review of decision denying the claim.

II:7 Upon the request of a Plan Participant or Beneficiary, the Committee shall furnish on the basis of the latest available information the individual's account balance under the plan and the nonforfeitable benefits under the plan, if any. No more than one request may be made by any Participant or Beneficiary for this information during any one 12 month period.

II:8 The Committee may require a Participant to complete and file with the Committee an application for a benefit and all other forms approved by the Committee, and to furnish all pertinent information requested by the Committee. The Committee may rely upon such information so furnished it, including the Participant's current mailing address.

II:9 As it is realized that it is not possible to anticipate by this Agreement all questions which may arise in the administration of this Plan, the Committee shall carry out the intent and purpose of this Plan in accordance with the authority vested in it.

ARTICLE III

PARTICIPATION AND SERVICE

III:1 Every employee on February 1, 1976, who was a participant in the Plan on February 1, 1974, shall continue to be a participant in the Plan.

In addition, the participation of any other employee eligible thereafter to become a participant shall commence as of the entry date coinciding with or next following the date he attains age 25.

III:2 A Participant's eligibility for benefits under the Plan shall be based on his period of Service, determined in accordance with the following:

(a) For a Participant as of the Effective Date, who had been covered under the prior provisions of the Plan, the Participant's last period of continuous employment with the Employer prior to the Effective Date shall be counted as Service, including such periods of Authorized Leave of Absence credited as Service under the provisions of the Plan in effect prior to the Effective Date. Service after the Effective Date shall be determined under subparagraph (b).

(b) Subject to subparagraph (a) and the reemployment provisions of Section III:4, a Participant shall accrue a year of Service for each Year in which he has 1,000 or more hours of employment, except that for Employees who become Participants on or after the Effective Date, years of Service before attainment of age 22 shall be disregarded. Hours of employment shall include periods of paid vacation, regular holidays, temporary illness and Authorized Leaves of Absence.

III:3 In the event that any Participant shall fail, in any Year of his employment after the Effective Date, to accumulate 1,000 hours of employment, his Employer Contribution Account shall be

placed on inactive status. In such case, such Year shall not be considered as a period of Service for the purposes of determining the Participant's vested interest, and the Participant shall not share in the Employer's contribution or in Forfeiture allocations for any such event such Participant accumulates 1,000 hours of employment in a subsequent Year, his Employer Contribution Account shall revert to active status with full rights and privileges under this Plan restored.

III:4 Participation in the Plan shall cease upon termination of employment with the Employer. Termination of employment may have resulted from Retirement, death or voluntary or involuntary termination of employment, unauthorized absence, or by failure to return to active employment with the Employer by the date on which an Authorized Leave of Absence expired.

Upon the reemployment of any person after the Effective Date who had previously been employed by the Employer on or after the Effective Date, the following rules shall apply in determining his Participation in the Plan and his Service under Section III:2.

(a) If the reemployed Employee was not a Participant in the Plan during his prior period of employment, he must meet the requirements for Participation in the Plan as if he were a new Employee.

If the reemployed Employee was a Participant in the Plan during his prior period of employment, he shall be entitled to re-participate in the Plan on February 1st on which he again meets the requirements. If such a terminated Participant is rehired before he has a one year Break in

Service as defined below, he may also be entitled to a beginning Employer Contribution Account.

(b) In the case of a Participant whose prior employment terminated with entitlement to a distribution from his Employer Contribution Account, any Service attributable to his prior period of employment shall be reinstated as of the date of his re-participation.

ARTICLE IV

CONTRIBUTIONS AND FORFEITURES

IV:1 The Employer shall, for each Year, pay to the Trustee an amount which will be sufficient to credit the Employer Contribution Account of each Participant whi [sic] is in the employ of the Employer on the day of the Year and whose Employer Contribution Account was not placed on inactive status for such Year, with an amount equal to 2.5% of excess compensation over $7,800.00 for such Year or (b) the maximum Addition allowable for such Year. If Forfeitures exceed the required contribution for the Year, the excess shall be held in Trust in a separate Forfeiture account and shall be available for allocation as of the end of the following Year.

All contributions of the Employer shall be paid to the Trustee, and payment shall be made not later than the date prescribed by law for filing the Employer's federal income tax returns, including extensions which have been granted for the filing of such tax return.

IV:2 Participants are not required to make any contributions under this Plan. However, a Partici-

pant may each Year voluntarily contribute to the Trust Fund an amount which does not exceed 10% of his Compensation while a Participant. Contributions of Participants may be made by payroll deduction or by other methods and at other intervals in accordance with rules established by the Committee. A contribution by a Participant shall be credited to his Employee Contribution Account.

A Participant's contributions shall be transmitted to the Trustee of the Trust Fund by the Employer within 60 days after the date on which the contribution was made.

At any time, but not more frequently than once a Year, a Participant may elect to withdraw from his Employee Contribution Account up to an amount equal to the lesser of the total of his contributions then credited to said Account (less amounts previously withdrawn) or the balance then credited to said Account. If a Participant elects to withdraw an amount greater than that set forth above, such a withdrawal will require the consent of the Committee. Such consent shall be given only in accordance with Committee rules and regulations applicable thereto, and applied uniformly to all Participants similarly situated. Upon any withdrawal, the Participant may not make additional contributions during the six-month period following the date his election is filed with the Committee or, if the withdrawal requires Committee consent, the date of such consent.

Elections to make contributions, withdraw contributions, discontinue contributions or resume contributions shall be in writing, signed by the Participant and on such form or forms as the Committee shall provide. Upon termination of

employment, the amount contributed by a Participant shall be distributed in accordance with Article IV.

IV:3 Upon termination of employment a Participant's Forfeiture, if any, shall be maintained in his Employer Contribution Account and shall continue to receive Income allocations until it is redistributed to his new Employer Contribution Account or until it becomes available to reduce the employer's contribution to the Plan. If the terminated Participant returns to the employ of the Employer before he has a one-year Break in Service and if the terminated Participant repays within 30 days after his reemployment, the amount of the distribution, if any, he received from his Employer Contribution Account at his previous termination of employment, the repaid amount and the Forfeiture maintained in his previous Employer Contribution Account, plus Income allocations, shall, upon re-participation become the beginning balance in his new Employer Contribution Account. If a Forfeiture is not reinstated under the preceding sentence, the terminated Participant's previous Employer Contribution Account shall be closed and his Forfeiture, plus Income allocations, shall be applied to reduce the Employer's contribution to the Plan for the Year in which the terminated Participant had a one year Break in Service.

IV:4 The Committee shall create and maintain adequate records to disclose the interest in the Trust of each Participant, Former Participant and Beneficiary. Such records shall be in the form of individual accounts, and credits and charges shall be made to such accounts in the manner herein described. When appropriate, a Participant shall have two separate accounts,

an Employer Contribution Account and an Employee Contribution Account. The maintenance of individual accounts is only for accounting purposes, and a segregation of the assets of the Trust Fund to each account shall not be required. If the Trust Fund is invested in Employer securities or real property, the assets of the Trust shall be segregated into two segments; one segment representing all monies held in Employer Contribution Accounts and the other representing all monies held in Employee Contribution Accounts. Distribution and withdrawals made from an account shall be charged to the accounts as of the date paid.

IV:5 The accounts of Participants, Former Participants and Beneficiaries shall be adjusted in accordance with the following:

(a) The Income of the Trust Fund for each Year shall be allocated to any separate Forfeiture account being held in Trust to the accounts of Participants, Former Participants and Beneficiaries who had unpaid balances in their accounts on the last day of the Year in proportion to the balances in such accounts at the beginning of the Year, but after first reducing each such account balance by any distributions from the account during the Year and after increasing the balance in each Employee Contribution Account at the beginning of the Year by one-half of any Employee contributions for such Year which were made either by regular payroll deductions or during the first half of such Year. If, upon termination of employment of a Participant, a change of 15% or more in the value of the assets of the Trust

Fund has occurred since the last Valuation Date and distribution is to be made prior to the next Valuation Date, the Committee shall instruct the Trustee to determine the Income since the last Valuation Date, in which event the accounts of any Participant whose employment terminates prior to the next Valuation Date shall be adjusted to reflect this determination. Each valuation shall be based on the fair market value of assets in the Trust Fund on the Valuation Date.

(b) As of the end of each Year, the Employer's contribution for the Year made plus the Forfeitures which are being applied to reduce the Employer's contribution for the Year, shall be allocated to the Employer Contribution Accounts of Participants for whom such contribution was made. The amount allocated to each such Participant's Employer Contribution Account shall be an amount equal to 2.5% of excess compensation over $7,800.00 for such Year or (ii) the maximum Addition allowable for such Year.

(c) A Participant's contributions for the Year shall be allocated to his Employee Contribution Account as of the last day of the Year. The net earnings and gains or losses of all assets other than life insurance contracts purchased whether such gains or losses have been realized or not, for each year will be allocated to each Participant's Account in the same ratio as each Participant's Account bears to the aggregate of all such accounts.

IV:6 Notwithstanding anything contained herein to the contrary, the total Additions made to both the Employer and Employee Contribution Accounts of a Participant for any Year after 1975 shall not exceed the lesser of $25,000 or 25% of the Participant's Compensation for such Year, except that such $25,000 shall be increased as permitted by Internal Revenue Service regulations to reflect cost-of-living adjustments.

If such Additions exceed the limitation, the contributions made by the Participant for the Year, which cause the excess, shall be returned to the Participant. If, after returning such contributions to the Participant, an excess still exists, the Employer's contribution for the Year on behalf of the Participant shall be limited to the amount sufficient to alleviate the excess.

Notwithstanding the foregoing, the otherwise permissible annual Additions for any Participant under this Plan may be further reduced to the extent necessary, as determined by the Committee, to prevent disqualification of the Plan under Section 415 of the Internal Revenue Code, which imposes additional limitations on the benefits payable to Participants who also may be participating in another tax-qualified pension, profit sharing, savings or stock bonus plan of the Employer. The Committee shall advise affected Participants of any additional limitation of their annual Additions required by the preceding sentence.

ARTICLE V

BENEFITS

V:1 Every participant shall retire for the purposes of this Plan on his or her normal retirement date or early retirement date.

Upon such date, the entire amount then credited to such participant's account shall become vested, and participation hereunder shall cease. The Employer, in accord with the provisions of Article V:5, shall direct the Trustee to distribute such vested amount to the participant. Upon distribution, such account shall be cancelled.

V:2 Upon the death of a participant before retirement or other termination of his employment, the entire amount then credited to his account shall become vested. The Employer, in accordance with the provisions of Section V:5 hereof, shall direct the Trustee to distribute such vested amount to any surviving beneficiary designated by the participant, or if none, to his estate.

Upon the death of a former participant, the Employer, in accordance with the provisions of Section V:5 hereof, shall direct the Trustee to distribute such vested amount the value of which has not been distributed to him at the time of death to any surviving beneficiary designated by him, or, if none, to his estate. As used herein, "former participant" means any person who has ceased to be a participant hereunder because of termination of employment for any reason other than death.

Upon such distribution to the beneficiary or estate of a participant or former participant, such units shall be cancelled.

The Employer may require such proper proof of death and such evidence of the right of any person to receive payment of the vested amount of a deceased participant or former participant as the Employer may deem desirable. The Employer's determination of death and of the right of any person to receive payment shall be conclusive.

Each employee, upon becoming a participant, may designate a beneficiary of his own choosing, and may, in addition, name a contingent beneficiary. Such designation shall be made in a form satisfactory to the Employer. Any participant may at any time revoke his designation of a beneficiary or change his beneficiary by filing written notice of such revocation or change with the Employer.

V:3 In the event of any participant's total and permanent disability, the entire amount then credited to his account shall become vested. The Employer shall direct the Trustee to distribute to such participant such vested amount. Upon such distribution, such vested amount shall be cancelled.

"Total and permanent disability" means a physical or mental condition of a participant resulting from a bodily injury or disease or mental disorder which renders him incapable of continuing in the employment of the Employer.

The total and permanent disability of any participant shall be determined by the Employer, in accordance with uniform principles consistently applied, upon the basis of such evidence as the Employer deems necessary and desirable.

V:4 If, upon termination of a participant's employment for any reason other than retirement, death, or total and permanent disability, the participant's vested amounts, in accord with the schedule in Article V:4, shall not exceed $1,750 (or any lesser amount as may, by regulations of the Secretary of the Treasury, be established as the maximum amount that may be paid out in such event without the participant's consent),

the Employer shall direct the Trustee to distribute such vested amounts to the participant. If the participant's vested amounts exceed the amount specified in the preceding sentence, the participant may file with the Employer a written request for the payment of the entire amount of his vested amount and the Employer shall therefore direct the Trustee to pay out this amount. Upon payment of such amounts, account represented thereby shall be cancelled.

If an employee, upon termination for any reason other than retirement, death, or total and permanent disability, does not consent to the payment of all of his or her vested amounts, and if such vested amounts exceeds $1,750 (or such lesser amount as may be prescribed by regulations of the Secretary of the Treasury governing such payments), the Employer shall direct the Trustee to place such vested amounts in one or more federally insured bank or savings and loan accounts in the name of the Trustee in trust for the named employee. The account represented thereby shall then be cancelled. The account and all accumulated interest shall be paid to the Employee at the time he attains his normal retirement age. In the event the employee dies before reaching retirement age, the account balance shall be paid to any beneficiary the employee has named in a written designation filed with the Employer, or, in the absence of such designation, to the employee's estate. The Trustee shall have no other responsibilities with respect to such accounts except that, if the balance of any such account shall approach the amount of federal insurance, the Trustee shall split the account into two or more accounts.

If an individual who has received a distribution of his or her vested amounts in accord with

Article V:4 above representing less than 100% of his accrued benefit is subsequently rehired, that individual may, within 60 days after re-employment, and provided a one-year break in service has not yet occurred, repay the amount of the distribution to the Trustee. Upon such repayment, the rehired individual shall immediately become a participant again and shall be credited on the vesting schedule with all years of previous service and his or her account will be credited with the entire amount which were nonvested at the time of his or her termination. No additional years of service shall be credited, however, until he or she shall have put in 1,000 hours of service in any 12 month period starting with the first of the month immediately following the month in which his or her last year of service ended.

A rehired employee who has received such a distribution of his vested amount and elects not to or cannot qualify to repay such amount shall be treated as a new employee and shall not be credited with any past service nor participate in the Plan until the eligibility requirements of the plan are met.

It shall be the duty of the Employer to give timely notification to any rehired employee, if such employee is eligible to make a repayment, of his or her right to make such repayment before a one-year break in service has occurred, and of the consequences of not making such repayment.

The vested portion of any participant shall be the percentage of the total amount credited to his or her account shown in the following schedule for the participant's completed years of credited service.

Completed Years of Participation	Percentage of Amount Vested
Less than 1	0%
1 but less than 2	10%
Increasing at the rate of 10% a year, until;	
10 or more years	100%

For purposes of vesting, all Years of Service of an employee with the Employer shall count as Years of Credited Service with the following exceptions:

(a) Years of Service prior to the time an employee attains age 22.

(b) Years of Service during a period for which the Participant declined to contribute if such contributions were mandatory.

(c) Years of Service during any period for which the Employer did not maintain this Plan or a predecessor plan, defined by the Secretary of the Treasury.

(d) Years of Service before January 1, 1971, unless the Participant has completed at least 3 years of service after December 31, 1970.

(e) Years of Service prior to a one-year break in service if the Participant was not vested and the number of consecutive one-year breaks equals or exceeds the aggregate of years of service preceding the break.

The portion of a Participant's Account attributable to his contributions shall be fully vested in the Participant at all times and shall be distributed to a terminated Participant, or retained

in his account until the portion of his account attributable to contributions by the Employer is distributed, as directed by such Participant.

The facts concerning the termination of a Participant's employment shall be transmitted to the Administrative Committee by written statement from the Employer.

In no event shall a Participant be divested or [sic] any accrued and vested benefit due to his discharge for cause.

V:5 The distributions provided hereunder shall be made in such one or more of the methods following as the Participant shall elect, or, if no election has been made by such Participant, in accord with (a) below:

(a) Purchase of a life annuity on the life of the Participant for an unmarried Participant, or a qualified joint and survivor annuity on the lives of the Participant and his spouse for a married Participant, unless the Participant shall have made an election to take an annuity on his life alone. For this purpose, a married Participant is one who has been married throughout the year preceding his retirement or death. All other Participants shall be considered unmarried. A "qualified" joint and survivor annuity is in [sic] an annuity for the life of the Participant and spouse which the survivor annuity for the life of the spouse is not less than half, nor greator [sic] than, the amount of the annuity payable during the joint lives of the Participant and spouse.

(b) Payment in ten (10) annual installments, plus any net profit earned by the funds in

such Participant's account, which profit shall be paid within 60 days after the last business day of each fiscal year of the Trust.

No distribution called for in Article V:1 through V:4 above shall start later than 60 days after the close of the plan year in which the employee retires (whether for disability or not) or otherwise terminates employment.

At least ninety (90), and no less than thirty (30) days before a Participant shall first become eligible for retirement, the Committee shall advise such Participant of his option or options under the paragraph above, and shall supply him with a form on which to indicate his choice or choices. The notice to any married Participant shall indicated [sic] the approximate benefits available upon retirement in the next year and shall indicate the benefits under both a joint and survivor annuity and a single life annuity, with an explanation of the operation of both kinds. The Committee shall have sixty (60) days from receipt of the notice in which to make his elections. In the absence of the filing of such elections, the Participants shall be deemed to have elected option (1)—a life annuity if he is single, a joint and survivor annuity if he is married.

If an employee dies within one year of the date on which an election or revocation was made (whichever was the latter), such election or revocation shall be considered null and void unless the death resulted from an accident occurring after the election or revocation, and making the election or revocation ineffective would deprive the surviving spouse of a survivor annuity.

The date on the election or revocation form shall be conclusive as to the date the election or revocation was made.

V:6 Claims for benefits under the plan shall be filed, on forms supplied by the Employer, with its Secretary. Written notice of the disposition of a claim shall be furnished the claimant within 30 days after the application therefor is filed. In the event the claim is denied, the reasons for the denial shall be specifically set forth, pertinent provisions of the plan shall be cited and, where appropriate, an explanation as to how the claimant can perfect the claim will be provided.

V:7 Any employer, former employee, or beneficiary of either, who has been denied a benefit, or feels aggrieved by any other action of the Employer or the Trustee, shall be entitled, upon request to the Secretary of the Employer and if he has not already done so, to receive a written notice of such action, together with a full and clear statement of the reasons for the action. If the claimant wishes further consideration of his position, he may obtain a form from the Secretary on which to request a hearing. Such form, together with a written statement of the claimant's position, shall be filed with the Employer no later than 90 days after receipt of the written notification provided for above or in Article V:6. The Employer shall schedule an opportunity for a full and fair hearing of the issue within the next 30 days. The decision following such hearing shall be made within 30 days and shall be communicated in writing to the claimant.

ARTICLE VI

LOANS

VI:1 The Committee may in its sole discretion and under such provisions for regular repayment, rates of interest (such rates of interest to be the prevailing rate of interest being charged by commercial banks in Mississippi), and other rules as they may adopt and follow, in a uniform and non-discriminatory manner, direct the Trustee to make a loan or loans from the Trust Fund to any Participant to relieve financial hardship, such as, but not limited to, the illness of a Participant or a member of a Participant's immediate family, or for the purpose of establishing or preserving the home in which a Participant resides. The Committee shall direct the Trustee to obtain from the Participant such note and security as it may require. In addition to any other security which may be required, the portion of a Participant's account which is attributable to Employer contributions shall secure such loans. In the event his employment terminates prior to the full repayment thereof, in addition to any other remedy provided in the loan instrument or instruments or by law, the Committee may direct the Trustee to charge against the portion of his account which secures the loan the amount required to fully repay the loan. No distribution shall be made to any Participant or to a beneficiary or beneficiaries or to the estate of a Participant, unless and until all unpaid loans to such Participant have either been paid in full or deducted from the account of the Participant. This Section authorizes only the making of bona fide loans and not distributions, and before resort is made against the portion of a Participant's

account for his failure to repay any loan, such other reasonable efforts to collect the same shall be made by the Committee as it deems reasonable and practical under the circumstances. All loans made under this Section shall be considered investments of the Trust Fund.

ARTICLE VII

TRUSTEE

VII:1 The Trustee shall receive any contributions paid to it in cash, or other property approved by the Investment Manager for acceptance by the Trustee. All contributions so received together with the income therefrom shall be held, managed, and administered in trust pursuant to the terms of this Agreement. The Trustee hereby accepts the Trust created hereunder and agrees to perform the duties under this Agreement on its part to be performed.

VII:2 The Trustee shall invest and reinvest the funds of the Trust, both principal and income, in such securities or property, real or personal, and wherever situated, as the Investment Manager shall advise and direct, including, but not limited to common or preferred stocks, bonds, mortgages, or other evidences or indebtedness or ownership, and regardless of whether these are of character authorized by applicable law for trust investments.

VII:3 The Trustee shall have the following powers and authority in the administration of the Trust to be exercised in accordance with and subject to the provisions of Article VII:4 hereof

(a) To purchase, or subscribe for, any securities or other property and to retain the same in trust.

(b) To sell, exchange, convey, transfer, or otherwise dispose of any securities or other property held by it, by private contract or at public auction. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity, expediency, or propriety of any such sale or other disposition.

(c) To vote upon any stocks, bonds, or other securities; to give general or special proxies or powers of attorneys with or without power of substitution; to exercise any conversion privileges, subscription rights, or other options, and to make any payments incidental thereto; to oppose, or to consent to, or otherwise participate in, corporate reorganizations or other changes affecting corporate securities, and to delegate discretionary powers, and to pay any assessments or charges in connection therewith; and generally to exercise any of the powers of an owner with respect to stocks, bonds, securities, or other property held as part of the Trust.

(d) To cause any securities or other property held as part of the Trust to be registered in its own name or in the name of one or more of its nominees, and to hold any investments in bearer form, but the books and records of the Trustee shall at all times show that all such investments are part of the Trust.

(e) To borrow or raise money for the purposes of the Trust in such amount, and upon such terms and conditions, as the Trustee shall deem advisable; and, for any sum so

borrowed, to issue its promissory note as Trustee, and to secure the repayment thereof by pledging all, or any part, of the Trust; and no person lending money to the Trustee shall be bound to see to the application of the money lent or to inquire into the validity, expediency or propriety of any such borrowing.

(f) To keep such portion of the Trust in cash or cash balances as the Trustee may, from time to time, deem to be in the best interests of the Trust, without liability for interest thereon.

(g) To accept and retain for such time as it may deem advisable any securities or other property received or acquired by it as Trustee hereunder, whether or not such securities or other property would normally be purchased as investments hereunder.

(h) To make, execute, acknowledge, and deliver any and all documents or transfer and conveyance and any and all other investments that may be necessary or appropriate to carry out the powers herein granted.

(i) To settle, compromise, or submit to arbitration any claims, debts, or damages due or owing to or from the Trust, to commence or defend suits or legal or administrative proceedings, and to represent the Trust in all suits and legal and administrative proceedings.

(j) To employ suitable agents and counsel (who may be counsel for the Employer),

and to pay their reasonable expenses and compensation.

(k) To purchase life insurance contracts on the lives of key employees of the Employer, payable on death to the Trust as beneficiary. Such insurance contracts shall be vested exclusively in the Trustee for the benefit of the Trust as a whole.

(l) To do all such acts, take all such proceedings, and exercise all such rights and privileges, although not specifically mentioned herein, as the Trustee may deem necessary to administer the funds, and to carry out the purposes, of this Trust.

VII:4 The powers granted the Trustee under Article VII:2 and VII:3 shall be exercised by the Trustee in its discretion insofar as such exercise does not contravene any written direction from the Committee nor the policy for the funding of the Plan to be developed under Article VII. Any written direction of the Committee may be of a continuing nature, but may be revoked in writing by the Committee at any time. The Trustee shall comply with any direction as promptly as possible, provided it does not contravene the terms of the plan, the funding policy developed under Article VII or the provision of any applicable law.

VII:5 The Trustee shall from time to time, on the written directions of the Employer, make payments out of the Trust to such persons, in such manner, in such amounts, and for such purposes as may be specified in the written directors [sic] of the Employer, and upon any such payment being made, the amount thereof shall no longer constitute a part of the Trust. Each such writ-

ten direction shall be accompanied by a certificate of the Employer that the payment is in accordance with the Plan.

VII:6 The Trustee shall be paid such reasonable compensation as shall from time to time be agreed upon in writing by the Employer and the Trustee. In addition, the Trustee shall be reimbursed for any reasonable expenses, including reasonable counsel fees, incurred by it in the administration of the Trust. Such compensation and expenses shall be paid by the Employer, but until paid shall constitute a charge upon the Trust. All taxes of any and all kinds whatsoever that may be levied or assessed under existing or future laws upon, or in respect of, the Trust or the income thereof shall be paid from the Trust.

VII:7 The Trustee shall keep accurate and detailed accounts of all investments, receipts, disbursements, and other transactions here under. All accounts, books and records relating to such transactions shall be open to inspection and audit at all reasonable times by the Committee or by any person designated by the Employer.

Within sixty (60) days following the close of each fiscal year of the Trust and with sixty (60) days after the removal or registration of the Trust [sic] as provided in Article VII:9 hereof, the Trustee shall file with the Employer a written accounting setting forth all investments, receipts, disbursements, and other transactions effected by it during such fiscal year or during the period from the close of the last fiscal year to the date of such removal or resignation, and setting forth the current value of the Trust.

VII:8 The Employer agrees to indemnify the Trustee against any liability imposed as a result of a claim by any person or persons where the Trus-

tee has acted in good faith in reliance on a written direction of the Employer or the Committee.

VII:9 The Trustee may be removed by the Employer at any time upon thirty (30) days' [sic] notice in writing to the Trustee. The Trustee may resign at any time upon thirty (30) days'[sic] notice in writing to the Employer. Upon such removal or resignation of the Trustee, the Employer shall appoint a successor trustee who shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon acceptance of such appointment by the successor trustee the funds and properties then constituting the Trust. The Trustee is authorized, however, to reserve such sum of money, as to it may seem advisable, for payment of its fees and expenses in connection with the settlement of its account or otherwise, and any balance of such reserve remaining after the payment of such fees and expenses shall be paid over to the successor trustee.

ARTICLE VIII

AMENDMENT AND TERMINATION OF TRUST

VIII:1 The Employer shall have the right at any time, and from time to time, to amend, in whole or in part, any or all of the provisions of this Agreement. However, no such amendment shall authorize or permit any part of the Trust (other than such part as is required to pay taxes and administration expenses) to be used for or diverted to purposes other than for the exclusive benefit of the participants or their beneficiaries or estates; no such amendment shall cause any reduction in the amount theretofore credited to any participant, or cause or permit any portion

of the Trust to revert to or become the property of the Employer; and no such amendment which affects the rights, duties or responsibilities of the Trustee may be made with the Trustee's written consent. Any such amendment shall become effective upon delivery of a written instrument, executed by order of the Board of Directors, to the Trustee and the endorsement of the Trustee of its receipt or of its written consent thereto, if such consent is required. Under no circumstance shall any funds or assets of this Trust revert to the Employer.

If any amendment changes the vesting schedule, any participant with 5 or more years of service may, by filing a written request thereto with the Employer within 60 days after he has received notice of such amendment; elect to have his vested percentage computed under the vesting schedule in effect prior to the amendment.

VIII:2 This Plan and Trust shall not be merged or consolidated with, nor shall any assets or liabilities be transferred to, any other plan, unless the benefits payable to each participant if the Plan was terminated immediately after such action would be equal to or greater than the benefits to which such participant would have been entitled if this Plan had been terminated immediately before such action.

VIII:3 The Employer shall have the right at any time to discontinue its contributions hereunder and to terminate or partially terminate this Agreement and the Trust hereby created, by delivering to the Trustee written notice of such discontinuance or termination.

Upon complete discontinuance of the Employer's contributions, or full or partial termination of

the Trust, all affected participants' amounts and rights to benefits shall become fully vested, and shall not thereafter be subject to forfeiture except to the extent that law or regulations may preclude such vesting in order to prevent discrimination in favor of officers, shareholders or highly compensated employees. Upon final termination of the Trust, the Employer shall direct the Trustee to distribute all assets remaining in the Trust, after payment of any expenses properly chargeable against the Trust, to the participants in accordance with the value of the amounts credited to such participants as of the date of such termination, in cash or in kind and in such manner as the Employer shall determine.

ARTICLE IX

LIFE INSURANCE

IX:1 Upon receipt of the executed application for a policy of an employee who has become eligible for participation in the Plan, the Employer shall direct the Trustee to purchase the following type of policy upon the Participant's life from such insurance company (herein referred to as "Insurer") as the Employer may select:

(a) an ordinary life insurance policy containing an annuity option, in an amount that will, upon exercise of such option and payment to the Insurer of the additional premiums specified therein at the normal retirement date of such Participant, provide such retirement income benefits. The ordinary life policy approved for and purchased may be in the maximum amount that can be purchased with not more than 49% of the Employer's first annual contribution allocated to such participant's account.

(b) a term insurance policy that when first applied for and purchased will not exceed 25% of the contributions allocated to said participant's account.

If any such employee is not so insurable, the Employer shall direct the Trustee to purchase for him a deferred annuity policy without life insurance protection that will provide a monthly annuity beginning at his normal retirement date and continuing for ten years certain and thereafter for his remaining lifetime.

Any policy that may be provided under this Plan shall contain an option permitting the Participant to take a qualified joint and survivor annuity, provided that he has been married throughout the year preceding his retirement or death (if death occurs before retirement) and also providing that, if the Participant has reached early retirement age and has elected a joint and survivor annuity but dies before actual retirement, the annuity payable to the survivor shall be equal to that payable to them jointly if the Participant had retired on the day before his death.

IX:2 The Trustee shall be the sole owner of all policies purchased hereunder, and it shall be so designated in each policy and application therefor.

IX:3 No insurer issuing a policy under this Agreement shall be required to take or permit any action contrary to the provisions of such policy; or be bound to allow any benefit or privilege to any person interested in any policy it has issued which is not provided in such policy; or be deemed to be a party to this Agreement for any purpose; or be responsible for the validity of this Agreement; or be required to look into the

terms of this Agreement or question any act of the Employer, Investment Manager, or Trustee hereunder; or be required to see that any action of the Employer, Investment Manager, or Trustee is authorized by this Agreement. Any such Insurer shall be fully discharged from any and all liability for any amount paid to the Trustee, or in accordance with its direction; and no Insurer shall be obligated to see to the application of any moneys so paid by it. Any such Insurer shall be fully protected in taking or permitting any action on the faith of any instrument executed by the Employer in its name as Employer, or by the Trustee in its name as Trustee, and shall incur no liability for so doing.

IX:4 All benefits, rights, privileges and options under each policy on the life of a Participant, and all dividends payable or refunds made by any Insurer on such policies shall be exercised and dealt with for the sole benefit of such Participant or his beneficiaries as directed by the Employer.

IX:5 Payments to the Insurer with respect to any insurance or annuity policy on the life of a Participant shall constitute an investment of the funds credited to a Participant's account. His account shall be reduced by any such payments.

ARTICLE X

MISCELLANEOUS

X:1 Except as may be specifically provided for by law, neither the establishment of the Trust hereby created, nor any modification thereof, nor the creation of any fund or account, nor

the payment of any benefits, shall be construed as giving to any participant or other person any legal or equitable right against the Employer, or any officer or employee thereof, or the Trustee, or the Committee, except as herein provided. Under no circumstances shall the terms of employment of any participant be modified or in any way affected hereby.

X:2 The right of any participant or beneficiary to any benefit or to any payment hereunder or to any separate account shall not be subject to alienation or assignment. If such participant shall attempt to assign, transfer or dispose of such right, or should such right be subjected to attachment, execution, granishment [sic], sequestration or other legal, equitable or other process, it shall ipso facto pass to such one or more as may be appointed by the Employer from among the beneficiaries, if any, theretofore designated by such participant and the spouse and blood relatives of the participant. However, the Employer in its sole discretion may reappoint the participant to receive any payment thereafter becoming due either in whole or in part. Any appointment made by the Employer hereunder may be revoked by the Employer at any time, and a further appointment made by it.

X:3 Whenever the Employer under the terms of this Agreement is permitted or required to do or perform any act or matter or thing it shall be done and performed by any officer thereunto duly authorized by its Board of Directors.

X:4 This Trust Agreement shall be construed according to the laws of the State of Mississippi, and all provisions hereof shall be administered according to the laws of such state.

X:5 Except as may be specifically provided for by law, in any action or proceeding involving the Trust, or any property constituting part or all thereof, or the administration thereof, the Employer, the Committee, and the Trustee shall be the only necessary parties and no employees or former employees of the Employer or their beneficiaries or any other person having or claiming to have an interest in the Trust or under the Plan shall be entitled to any notice of process.

Except as may be specifically provided for by law, any final judgment which is not appealed or appealable that may be entered in any such action or proceeding shall be binding and conclusive on the parties hereto and all persons having or claiming to have any interest in the Trust or under the Plan.

IN WITNESS WHEREOF, the Employer and the Trustee have caused this Agreement to be executed by their duly appointed officers and their corporate seal to be hereunto affixed the day and date first above written.

THE SURGICAL CLINIC OF BILOXI, P.A.

By /s/ J. R. Adkins
President

/s/ J. R. Adkins
Trustee

/s/ Ray L. Wesson, M.D.
Trustee

ATTEST:

Secretary

/s/ Ray L. Wesson, M.D.

STATE OF MISSISSIPPI)

COUNTY OF HARRISON)

PERSONALLY appeared before me, the undersigned authority in and for the aforesaid County and State, Jerry R. Adkins and Ray L. Wesson, who acknowledged that as President and Secretary, respectively, and on behalf and by the authority of The Surgical Clinic of Biloxi, P.A., a corporation, they signed, sealed and delivered the foregoing instruments of writing on the day and year therein mentioned, for the purposes therein set forth and as the act and deed of said corporation.

WITNESS my signature and official seal of office on this the 21 day of June, 1976.

/s/ Margie V. Edwards
Notary Public

My Commission Expires:
9/25/76

STATE OF MISSISSIPPI)

COUNTY OF HARRISON)

PERSONALLY appeared before me, the undersigned authority in and for the aforesaid jurisdiction, Jerry R. Adkins and Ray L. Wesson, as Trustees of the The Surgical Clinic of Biloxi, P.A. Money Purchase Pension Trust, who acknowledged that they signed and delivered the foregoing instrument of writing on the day and year therein mentioned, as their act and deed in such capacity and for the purposes therein set forth.

WITNESS my signature and official seal of office, on this the 21 day of June, 1976.

/s/ Margie Edwards
Notary Public

My Commission Expires:
Sept. 25, 1976

APPENDIX E

IN THE SUPREME COURT OF MISSISSIPPI

No. 56,046

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Appellant

vs.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN OF RAY LAMAR WESSON, JR., ALISON LYNN WESSON, DAVE NEWTON WESSON AND JASON MANNING WESSON, MINORS; CORPORATE PLANNING, LTD. AND W. A. WIMBERLY,
Appellees

MOTION OF APPELLANT FOR LEAVE TO AMEND ASSIGNMENT OF ERRORS AND TO PRESENT FURTHER ARGUMENTS

The Mutual Life Insurance Company of New York, Appellant herein, respectfully moves this Court to grant it leave to amend its Assignment of Errors in the manner set out below and to present further arguments in support thereof, and as grounds therefor would show unto the Court the following:

1.

This appeal is presently scheduled to be argued orally before this Court on November 19, 1986.

2.

The Appellant seeks leave to amend its Assignment of Errors by adding the following:

31.

The jury's award of punitive damages of $8,000,000 violates the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States and the Excessive Fines Clause of Section 28 of the Mississippi Constitution of 1890.

Further, the Appellant seeks leave to present arguments (in a supplement to its Brief, not to exceed two pages) to this Court in support of this additional assignment of error.

3.

The violation of the federal and state constitutions is an important issue which should be addressed by this Court in this case. This Court has repeatedly held that punitive damages are not awarded as compensation to a plaintiff but rather as punishment against a defendant. Thus, punitive damages in this state are in the nature of a fine or penalty and, accordingly, are subject to the federal and state constitutional provisions prohibiting "excessive fines."

4.

The granting of the leave requested by this Motion will not result in prejudice to the Appellees, and will impose [sic] an undue burden on the Appellees, in view of the size of the jury's award of punitive damages and the magnitude of the Record presently before this Court. The Appellant is prepared to submit arguments in support of this proposed additional assignment of error prior to oral argument or at such other time as this Court may direct. Further, this Court may establish a schedule for submission of any response by the Appellees to the Appellant's arguments.

The Appellant, The Mutual Life Insurance Company of New York, therefore respectfully requests this Court to grant it leave to amend its Assignment of Errors in the manner set out herein, to present further arguments

(in a supplemental to its Brief, not to exceed two pages) in support of the additional assignment of error, and to establish a schedule for submission of such further arguments and any response thereto.

Respectfully submitted,

NATIE P. CARAWAY
RICHARD D. GAMBLIN
WISE CARTER CHILD & CARAWAY
Professional Association
Post Office Box 651
Jackson, Mississippi 39205

By /s/ Richard D. Gamblin
Attorneys for Appellant
The Mutual Life
Insurance Company of
New York

CERTIFICATE OF SERVICE

I, Richard D. Gamblin, do hereby certify that I have this day caused a true and correct copy of the above and foregoing Motion of Appellant for Leave to Amend Assignment of Errors and to Present Further Arguments to be mailed by United States Mail, postage prepaid, to the following:

Paul S. Minor
Judy M. Guice
Post Office Drawer 1388
Biloxi, Mississippi 39533

Clyde H. Gunn, III
Corban & Gunn
Post Office Drawer 1916
Biloxi, Mississippi 39533

Charles R. Davis
Barry S. Zirulnik
Thomas, Price, Alston, Jones & Davis
Post Office Drawer 1532
Jackson, Mississippi 39205

THIS, the 13 day of November, 1986.

/s/ Richard D. Gamblin
RICHARD D. GAMBLIN

APPENDIX F

LAW OFFICES

WISE CARTER CHILD & CARAWAY
Professional Association
600 Heritage Building
Congress at Capitol

(601) 968-5534

May 22, 1987

HAND DELIVER

The Honorable Roy Noble Lee
Presiding Justice
Supreme Court of Mississippi
Carroll Gartin Justice Building
Jackson, Mississippi 39201

The Honorable Reuben V. Anderson
Justice
Supreme Court of Mississippi
Carroll Gartin Justice Building
Jackson, Mississippi 39201

The Honorable J. Ruble Griffin
Justice
Supreme Court of Mississippi
Carroll Gartin Justice Building
Jackson, Mississippi 39201

Re: The Mutual Life Insurance Company of New York v. Estate of Ray Lamar Wesson, M.D., *et al.*, Supreme Court of Mississippi, No. 56,046

Gentlemen:

It is our understanding that it is the duty of counsel to inform the Court of any intervening court decision which may affect the outcome of an appeal under submission. Therefore, we respectfully wish to call to the attention of the Court the decision of the Supreme Court of the United States in *Pilot Life Insurance Co. v. De-*

deaux, 55 U.S.L.W. 4471 (U.S. Apr. 6, 1987). A copy of this decision is enclosed for your convenience.

I am forwarding six (6) copies of this letter and six (6) copies of the *Pilot Life* decision to the Clerk, for distribution to the other members of the Court. Copies of this letter are being simultaneously mailed to counsel of record for the Wesson Estate and to counsel of record for Corporate Planning, Ltd. and W. A. Wimberly.

The captioned appeal was orally argued before you on November 19, 1986. As explained herein, *Pilot Life Insurance Co. v. Dedeaux*, 55 U.S.L.W. 4471 (U.S. Apr. 6, 1987), is dispositive of the major issue before this Court in the present appeal: the award of punitive damages of $8,000,000.00 in favor of the Wesson Estate against The Mutual Life Insurance Company of New York.

Both *Pilot Life Insurance Co. v. Dedeaux*, 55 U.S.L.W. 4471 (U.S. Apr. 6, 1987), and this case involve a claim for benefits under an "employee benefit plan," which the Employee Retirement Income Security Act of 1974 (ERISA) [29 U.S.C. §§ 1001 *et seq.*] defines as "an employee welfare benefit plan [as in *Pilot Life*] or an employee pension benefit plan [as here] . . . ." *See* ERISA § 3(3); 29 U.S.C. § 1002(3). In *Pilot Life*, the Supreme Court of the United States held that ERISA pre-empted the plaintiff's suit under Mississippi common law for alleged improper processing of his claim for benefits under a benefit plan regulated by ERISA. Following a detailed discussion of ERISA and its civil enforcement provisions [ERISA § 502; 29 U.S.C. § 1132], the Supreme Court concluded that Dedeaux's claims based upon "tortious breach of contract" and "the Mississippi law of bad faith" were pre-empted by ERISA § 514(a) [29 U.S.C. § 1144(a)]. *See* 55 U.S.L.W. at 4472-75.

The Supreme Court described ERISA's civil enforcement provisions as "a comprehensive civil enforcement scheme that represents a careful balancing of the need

for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 4474. The only applicable remedies authorized by ERISA § 502 are the recovery of benefits due to the participant or beneficiary and the allowance, in the court's discretion, of a reasonable attorney's fee and costs. ERISA § 502(a)(1)(B), (g)(1); 29 U.S.C. § 1132(a)(1)(B), (g)(1). The Supreme Court held in *Pilot Life* that the foregoing statutory remedies were clearly intended to be exclusive. 55 U.S.L.W. at 4474-75.

In this appeal, the following facts are plainly demonstrated by the record presently before the Court:

1. The MONY policy insuring the life of Dr. Wesson was owned by the Surgical Clinic of Biloxi, P.A. Pension Plan. Premiums for this policy were paid with pension plan funds or by loans from the policy's cash value.
2. The Surgical Clinic of Biloxi, P.A. Pension Plan was an ERISA-regulated plan.
3. Benefits under the Wesson policy were paid into the registry of the Circuit Court of Jackson County, Mississippi in December 1982, where they remain in an interest-bearing account.
4. No award of attorney's fees was sought by the Wesson Estate. That claim was voluntarily withdrawn from this case by the attorneys for the Wesson Estate, by virtue of an amendment to the Complaint.

Based upon the decision in *Pilot Life*, any and all other claims relating to the handling of the Wesson claim are pre-empted by ERISA's civil enforcement provisions. The award of punitive damages in *Wesson* is, therefore, invalid under the supremacy clause of the Constitution of the United States and must be reversed by this Court. *See U.S. Const.* art. VI, cl. 2.

The present record reflects that, in 1974, the Surgical Clinic of Biloxi, P.A. (of which Dr. Wesson was a 50 percent owner) adopted a pension plan which used life insurance policies issued by MONY as funding vehicles for the plan. *See, e.g., Abstract of the Record* (hereinafter cited as *A.*) vol. I, at 94, 98-99, 114-15, 126-27, 128, 129 (testimony of W. A. Wimberly); *A.* vol. II, at 204-05 (testimony of Matt Ballew). As MONY has previously pointed out in briefs filed with this Court and at oral argument, the insurance policy in question in this case was a tax-qualified pension trust policy which was owned, not by Dr. Wesson, but instead by his professional association's pension plan. *See Brief for Appellant*, at 2-3, 9; *A.* vol. I, at 131-32 (Wimberly testimony); *A.* vol. II, at 204-05 (Ballew testimony).

In addition, premiums for this policy were paid initially with pension plan funds and later by loan from the policy's cash value. *A.* vol. I, at 98-99. The facts are confirmed by the briefs filed in this Court by the Appellees. *See, e.g., Wesson Brief*, at 1 ("The policy Dr. Wesson purchased was a standard form whole-life MONY insurance policy put into a pension plan . . . ."); *Corporate Planning Brief*, at 6 ("One of the policies sold to the Clinic's pension plan was the MONY policy insuring Dr. Wesson."); *id.* at 7 ("From 1974 until 1977, the Clinic paid premiums due on the policy at issue via an escrow account of the pension plan."); *id.* at 8 ("In 1978 and 1979, Drs. Wesson and Adkins [the Trustees of the Clinic's pension plan] decided to pay premiums on their MONY policies by borrowing against the policies' accumulated cash value.").

The policy was purchased to fund a tax-qualified corporate retirement plan, The Surgical Clinic of Biloxi, P.A. Pension Plan. *A.* vol. II, at 204-05. It was applied for and issued at a time when Corporate Planning, Ltd. was performing various services for Dr. Wesson and his partner, Dr. Jerry Adkins, including forming the Sur-

gical Clinic of Biloxi, P.A. and setting up pension and profit-sharing plans for this professional association. *A.* vol. I, at 114-15, 126-28.

The record also plainly establishes that, following the enactment of ERISA, Corporate Planning took action to bring the Surgical Clinic's pension plan into compliance with ERISA. Matt Ballew, one of the principals of Corporate Planning, testified at trial that he performed the necessary legal work to accomplish this compliance with ERISA in 1976, while he was in private law practice. *A.* vol. II, at 201-02. In addition, it is beyond dispute that this pension plan was covered and regulated by ERISA. *See* ERISA § 4; 29 U.S.C. § 1003.

As previously stated, benefits payable under the Wesson policy were paid into the registry of the Circuit Court well over four years ago, and the Wesson Estate voluntarily removed its request for attorney's fees by amending the Complaint. *A.* vol. I, at 9, 15-16; *Brief for Appellant*, at 17-18. In view of the *Pilot Life* decision, the punitive damages award of $8,000,000.00 in *Wesson* cannot stand. That award is based, as were Dedeaux's claims, upon an alleged tortious breach of contract and this state's "law of bad faith." Here, as in *Pilot Life*, the Wesson Estate's state law suit is pre-empted by ERISA § 514(a), and the punitive damages award must be reversed, under the supremacy clause of the Constitution of the United States.

The only remaining issues before this Court are, therefore, amendment of the judgment in favor of the Wesson Estate (with respect to the correct amount of benefits due under the policy), *see Brief for Appellant*, at 40, and disposition of the appeal of the judgment rendered against MONY in favor of Corporate Planning, Ltd. and W. A. Wimberly.

If the Court desires presentation of additional information or submission of supplemental briefs with respect

to *Pilot Life* and its applicability to this appeal, please advise.

Thank you for your consideration of the foregoing matters.

Respectfully yours,

WISE CARTER CHILD & CARAWAY
Professional Association

By: /s/ Natie P. Caraway
NATIE P. CARAWAY
Attorneys for the Mutual Life
Insurance Company of New York

NPC/dml
Enclosure

cc: Mrs. Sue Gordon
Paul S. Minor, Esquire
Clyde H. Gunn III, Esquire
Charles R. Davis, Esquire
Barry S. Zirulnik, Esquire

APPENDIX G

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSISSIPPI

Civil Action No. 12,008

ESTATE OF RAY LAMAR WESSON, M.D., Deceased, by EMOGENE HALL, ADMINISTRATOR [sic] and as GUARDIAN OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON, and JASON MANNING WESSON, Minors,

Plaintiffs

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, CORPORATE PLANNING, LTD., and W. A. WIMBERLY,

Defendants

MOTION OF DEFENDANT, MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, FOR A REMITTITUR

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, one of the Defendants herein, respectfully moves this Court to enter judgment in its favor on the claim of the Plaintiff for punitive damages and on the cross-claim of Corporate Planning, Ltd. and W. A. Wimberly notwithstanding the verdicts rendered against said Defendant, or, in the alternative, to grant a new trial on all issues, or, in the alternative, to order a remittitur as to all verdicts rendered against this Defendant, and in support of such Motion would show unto the Court the following:

1. That the verdicts rendered against this Defendant were contrary to the law.

2. That the verdicts rendered against this Defendant were contrary to the overwhelming weight of the evidence.

3. That the verdicts rendered against this Defendant were contrary to the law and evidence submitted in this case.

4. That the verdicts rendered by the jury were so excessive and unwarranted as to evince bias, passion and prejudice on the part of the jury against this Defendant to the extent that such verdicts should be set aside by the Court and a new trial ordered. In support of this ground for a new trial, attached hereto as Exhibit "A" and included herein as though set forth in full is an Affidavit of Roy C. Williams, one of the attorneys for the Defendant, Mutual Life Insurance Company of New York, reflecting comments of the guardian of the persons of the minor Wesson children which appeared in the February 16, 1984 issue of The Clarion Ledger, a newspaper published in Jackson, Mississippi with state-wide distribution, such article appearing on the front page of said newspaper. Said article reflects that the guardian of the persons of the minor Wesson children was shocked at the amount of the damages awarded by the jury.

5. That the verdicts rendered by the jury were so excessive and unwarranted as to evince bias, passion and prejudice by the jury so as to justify an order of remittitur by this Court.

6. The Court erred in refusing to grant Mutual Life Insurance Company of New York's first Motion for Summary Judgement, which was based upon the Plaintiff's obligation to mitigate damages, avoidable consequences, and the Plaintiff's duty to deal with Mutual Life Insurance Company of New York in good faith.

7. The Court erred in failing to grant Mutual Life Insurance Company of New York's second Motion for Summary Judgment, based upon Mutual Life Insurance of New York's unilateral mistake.

8. The Court erred in sustaining the Plaintiff's motion to strike the defenses pleaded by Mutual Life Insurance Company of New York relating to the Plaintiff's obligation to mitigate damages, avoidable consequences, and the Plaintiff's duty to deal with Mutual Life Insurance Company of New York in good faith.

9. The Court erred in failing to direct a verdict for Mutual Life Insurance Company of New York on the Plaintiff's claim for punitive damages.

10. The Court erred in failing to direct a verdict for Mutual Life Insurance Company of New York on the crossclaim of Corporate Planning, Ltd. and W. A. Wimberly.

11. The Court erred in failing to grant a peremptory instruction in favor of The Mutual Life Insurance Company of New York on the Plaintiff's claim for punitive damages.

12. The Court erred in failing to grant a peremptory instruction in favor of Mutual Life Insurance Company of New York on the claim of Corporate Planning, Ltd. and W. A. Wimberly for actual damages, and in failing to grant a peremptory instruction in favor of Mutual Life Insurance Company of New York on the claim of Corporate Planning, Ltd. and W. A. Wimberly for punitive damages.

13. The Court erred in its January 20, 1984 ruling which granted the Plaintiff and the Defendants, Corporate Planning, Ltd. and W. A. Wimberly, a total of six peremptory jury challenges and which granted Mutual Life Insurance Company of New York four peremptory jury challenges.

14. The Court erred in reversing its January 20, 1984 ruling after voir dire, by granting the Plaintiff four peremptory jury challenges, granting the Defendants, Corporate Planning, Ltd. and W. A. Wimberly, four peremptory jury challenges, and leaving Mutual Life Insurance Company of New York with four peremtory jury challenges, thereby compounding the error made by the Court on January 20, 1984.

15. The Court erred in failing to increase the number of peremptory jury challenges for Mutual Life Insurance Company of New York after it was brought to the Court's attention that counsel for Plaintiff and counsel for Corporate Planning, Ltd. and W. A. Wimberly had acted in concert in utilizing peremptory challenges available to them.

16. The Court erred in allowing the Plaintiff to offer evidence as to the financial condition of Mutual Life Insurance Company of New York during the Plaintiff's case in chief, in that such proof was presented to the jury before the Court ruled on the propriety of the granting of a punitive damages instruction in favor of the Plaintiff.

17. The Court erred in allowing counsel for the Plaintiff to cross-examine the representative of Mutual Life Insurance Company of New York pertaining to its total assets rather than its net worth. Counsel for Plaintiff repeatedly referred to the amount of total assets before the jury, and such remarks and statements were highly prejudicial to this Defendant and were made over the objection of this Defendant.

18. Over the objection of this Defendant, Plaintiff was permitted to cross-examine the representative of Mutual Life Insurance Company of New York as to the alleged inadequacy of the funds tendered into the Registry of the Court as a result of the Plaintiff's contention that inappropriate amounts had been callously deducted from

the face value of the policy in question, at a time when the Plaintiff's counsel had in his possession the amount of $3,745.70 paid by this Defendant to Plaintiff's counsel in June of 1980.

19. Over the objection of this Defendant, Plaintiff was permitted to cross-examine the representative of Mutual Life Insurance Company of New York as to the rate of interest paid by Mutual Life Insurance Company of New York on funds tendered into the Registry of the Court even though there was no legal requirement either statutory or contractual for any such interest payment. The Court further erred by reversing its earlier decision on such matter rendered on January 20, 1984 where the Court ruled that such matter was a post-judgment matter and not admissible at trial. The Court further erred in allowing such cross-examination to inquire into interest allegedly earned by Mutual Life Insurance Company of New York on its investments over the objection of this Defendant, such testimony being irrelevant and immaterial and calculated solely to bias and prejudice the jury.

20. The Court erred in allowing counsel for Corporate Planning, Ltd. and W. A. Wimberly to withdraw an exhibit which reflected other insurance policies on the life of Ray L. Wesson procured and managed by Corporate Planning, Ltd., further showing an agency relationship between Corporate Planning, Ltd., W. A. Wimberly and the Surgical Clinic of Biloxi, P.A.

21. The Court erred in excluding testimony and documentary evidence relating to other insurance policies on the life of Dr. Ray L. Wesson, which would establish the agency relationship between Wimberly, Corporate Planning, Ltd., The Surgical Clinic of Biloxi, P.A., and Dr. Wesson.

22. The Court erred in refusing to allow Mutual Life Insurance Company of New York to present evidence as

to the relationship which existed between Corporate Planing, Ltd. and The Surgical Clinic of Biloxi, P.A. Such evidence was proffered by Mutual Life Insurance Company of New York and showed a continuous course of conduct between Corporate Planning, Ltd. and The Surgical Clinic of Bilox, P.A. and included, among other things, the administration of pension and profit sharing plans, purchase of insurance for and on behalf of the Clinic, payment of premiums on such insurance by Corporate Planning, Ltd. and subsequent billing for same to the Clinic by Corporate Planning, Ltd., and the handling of insurance premiums and insurance matters for and on behalf of the Clinic by Corporate Planning, Ltd. Such evidence was directly relevant to the issue of whether or not Corporate Planning, Ltd. and W. A. Wimberly were acting as agents of Mutual Life Insurance of New York with respect to the payment of the premium due February 1, 1980 on the policy in question.

23. The Court erred in refusing to allow Mutual Life Insurance Company of New York to cross-examine M. L. Ballew III as to the tax advantages of pension trust policies and the overall tax aspects of the corporate structure of The Surgical Clinic of Biloxi, P.A. The financial structure had been devised and was being administered by Corporate Planning, Ltd., and such testimony was directly relevant to Mutual Life Insurance Company of New York's position that the automatic premium loan provision was not available in a pension trust policy.

24. The Court erred in allowing M. L. Ballew III to testify as to the propriety of including an automatic premium loan provision in a pension trust policy, in that such testimony was irrelevant to any issue before the Court.

25. The Court erred in refusing to permit this Defendant to call Charles R. Davis as a witness, even out of the presence of the jury, to testify as to disclosure of confidential information to counsel for the Plaintiff as

to the source of information contained in the Plaintiff's May, 1983 request for production of documents (listing names of insureds and policy numbers), and as to instructions given by him to Corporate Planning, Ltd. and/or W. A. Wimberly to contact employees of Mutual Life Insurance Company of New York directly, rather than through its counsel, after this action was filed.

26. The Court erred in allowing M. L. Ballew III to testify as to the policies of other insurance companies regarding automatic premium loan provisions in pension trust policies.

27. The Court erred in striking a portion of an exhibit prepared by M. L. Ballew III offered by Corporate Planning, Ltd. and W. A. Wimberly as to insurance commissions earned by Corporate Planning, Ltd. through The Surgical Clinic of Biloxi, P.A.

28. The Court erred in admitting into evidence over the objection of Mutual Life Insurance Company of New York an exhibit offered by Corporate Planning, Ltd. and W.A. Wimberly, in that the exhibit was not furnished to Mutual Life Insurance Company of New York until the time of its use. The exhibit was utilized by an expert witness, Dr. Charles Dennis, in his testimony to show damages allegedly sustained by Corporate Planning, Ltd. and W. A. Wimberly, and the admission of this exhibit was highly prejudicial to this Defendant.

29. The Court erred in allowing Dr. Charles Dennis to testify as an expert witness on behalf of Corporate Planning, Ltd. and W. A. Wimberly, such testimony being totally speculative and without foundation.

30. The Court erred in allowing counsel for Corporate Planning, Ltd. and W. A. Wimberly to read portions of the deposition of Dr. Jerry Adkins under the circumstances, in that counsel for Corporate Planning, Ltd. and W. A. Wimberly did not exercise reasonable diligence to procure his presence at trial.

31. The Court erred in allowing, over the objection of Mutual Life Insurance Company of New York, evidence and testimony about the failure of Mutual Life Insurance Company of New York to return telephone calls from representatives of Corporate Planning, Ltd. after the filing of this action, in that such matters are totally irrelevant in determining whether Mutual Life Insurance Company of New York acted in bad faith.

32. The Court erred in allowing further discovery by counsel for the Plaintiff during the cross-examination of a witness and after one week of trial. Such disclosure was contrary to this Court's January 20, 1984 ruling on a Motion to Compel filed by the Plaintiff relating to the identical matters, and was ordered by the Court over the objection of this Defendant. Further, this Court's order required the disclosure of matters which comprised work product, mental impressions, and privileged matters.

33. The Court erred in excluding portions of the materials prepared by Corporate Planning, Ltd. and given to Caleb Dortch, Jr. at or about the time Corporate Investments, Ltd. entered into an agency agreement with Mutual Life Insurance Company of New York.

34. The Court erred in sustaining objections to the admission of Mutual Life Insurance Company of New York's April 8, 1980 letter to the Trustees of The Surgical Clinic of Biloxi, P.A. Pension Plan regarding the lapse of Dr. Jerry Adkins' policy to reduced paidup, in that this exhibit was relevant to show knowledge of counsel for the Plaintiff as to the manner in which the Ray L. Wesson death claim was handled.

35. The Court erred in admitting evidence as to legal fees incurred by Mutual Life Insurance Company of New York in connection with this litigation.

36. The Court erred in refusing to allow introduction of evidence as to the fee arrangement between the Plaintiff and its attorneys, as reflected in the public records

filed with the Chancery Court of Jackson County, Mississippi in the Guardianship of the Wesson children.

37. The Court erred in refusing to permit Mutual Life Insurance Company of New York to examine Clyde H. Gunn III in the presence of the jury as to his duties with respect to the Estate of Ray L. Wesson, the Estate of Deloras Ann Wesson, and the Guardianship of the minor Wesson children; as to his knowledge of the presence of the automatic premium loan provision in the policy in question; and as to his failure to apprise Mutual Life Insurance Company of New York of his knowledge relating to the policy provisions.

38. The Court erred in refusing to permit Mutual Life Insurance Company of New York to examine Paul S. Minor, even outside the presence of the jury, regarding his knowledge of the presence of the automatic premium loan provision in the policy in question prior to the filing of this action.

39. The Court erred in refusing to allow Mutual Life Insurance Company of New York to present evidence that the Complaint filed in this action makes no reference whatsoever to an automatic premium loan provision in the policy in question.

40. The Court erred in refusing to allow Mutual Life Insurance Company of New York to present evidence that Exhibit "A" to the Complaint filed in this cause did not include the part of the application which contains the questions by which an applicant could request an automatic premium loan provision.

41. The Court refused to allow this Defendant to offer testimony as to the delay between the original claim made against this Defendant by the Plaintiff and the ultimate filing of this suit, and further refused to allow impeachment testimony and evidence offered by this Defendant on the family disputes which occurred during that period of time and allegedly caused such delay. This

Defendant was not permitted to make a record or proffer of testimony on this subject matter.

42. The Court erred in adversely commenting, in the presence of the jury, on the qualifications of Andrew G. Watson, expert witness for Mutual Life Insurance Company of New York, prior to testimony by him.

43. The Court erred in allowing counsel for the Plaintiff to cross-examine Andrew G. Watson about letters mailed by Mutual Life Insurance Company of New York to holders of pension trust policies in 1983, of which he had no knowledge.

44. The Court refused to give certain instructions offered by this Defendant though requested so to do by this Defendant.

45. The Court gave certain instructions to the Plaintiff and to the Defendant, Corporate Planning, Ltd. and W. A. Wimberly, over the objection of this Defendant.

46. The Court overruled objections made by this Defendant in favor of the Plaintiff or Defendants, Corporate Planning, Ltd. and W. A. Wimberly.

47. The Court sustained objections made by the Plaintiff and/or the Defendants, Corporate Planning, Ltd. and W. A. Wimberly, to the detriment of this Defendant.

48. Over the objection of this Defendant, the Court erred in granting and allowing the Plaintiff, Wesson Estate, and the Cross-Plaintiff, Corporate Planning, Ltd. and W. A. Wimberly, time for final argument far in excess of the time allocated to this Defendant even though this Defendant was, pursuant to rulings of the Court, defending two (2) separate and distinct claims, one from each of the above-named parties against this Defendant, but was not permitted to spend the same amount of time in summation as the combined total of the two said parties, and even permitted the Plaintiff to exceed the argument time at the conclusion of the final summation.

WHEREFORE, PREMISES CONSIDERED, The Mutual Life Insurance Company of New York respectfully requests this Court to enter judgment notwithstanding the verdict in its favor on the Plaintiff's claim for punitive damages and on the crossclaim of Corporate Planning, Ltd. and W. A. Wimberly, or, in the alternative, to grant it a new trial, or, in the alternative, to order a remittitur, for the reasons set out above.

Respectfully submitted,

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

By: /s/ MEGEHEE, BROWN, WILLIAMS & MESTAYER, P.A.

By: /s/ Roy C. Williams
ROY C. WILLIAMS

MEGEHEE, BROWN, WILLIAMS
& MESTAYER
3112 Canty Street
Post Office Box 787
Pascagoula, MS 39567
Telephone: (601) 762-2271

WISE, CARTER, CHILD & CARAWAY
600 Heritage Building
Post Office Box 651
Jackson, MS 39205
Telephone: (601) 354-2385

NOTICE OF HEARING

TO: Paul S. Minor
Post Office Drawer 1388
Biloxi, MS 39533

Clyde H. Gunn III
Corban & Gunn
Post Office Drawer Q
Biloxi, MS 39533

Charles R. Davis
Thomas, Price, Alston,
Jones & Davis
Post Office Drawer 1532
Jackson, MS 39205

PLEASE TAKE NOTICE that the undersigned, counsel of record for the Defendant, The Mutual Life Insurance Company of New York, will bring on for hearing the above and foregoing Motion of Defendant, The Mutual Life Insurance Company of New York, for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, or, in the Alternative, for a Remittitur, before the Honorable Darwin Maples, Circuit Judge, at the Jackson County Courthouse, Pascagoula, Mississippi, on the 2nd day of March, A.D., 1984, at 10:00 A.M., or as soon thereafter as counsel may be heard.

/s/ Roy C. Williams
ROY C. WILLIAMS
Attorney for Defendant
The Mutual Life Insurance
Company of New York

CERTIFICATE OF SERVICE

I, ROY C. WILLIAMS, hereby certify that I have this day caused a true and correct copy of the above and foregoing Motion of Defendant, The Mutual Life Insurance Company of New York, for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, or, in the Alternative, for a Remittitur and Notice of Hearing to be mailed by United States Mail, postage prepaid, to:

Paul S. Minor
Post Office Drawer 1388
Biloxi, MS 39533

Clyde H. Gunn III
Corban & Gunn
Post Office Drawer Q
Biloxi, MS 39533

Charles R. Davis
Thomas, Price, Alston,
Jones & Davis
Post Office Drawer 1532
Jackson, MS 39205

THIS, the 24th day of February, 1984.

/s/ Roy C. Williams
ROY C. WILLIAMS

EXHIBIT "A"

STATE OF MISSISSIPPI

COUNTY OF JACKSON

AFFIDAVIT OF ROY C. WILLIAMS

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, ROY C. WILLIAMS, one of the attorneys for the Defendant, Mutual Life Insurance Company of New York, and stated on oath that attached to this Affidavit is a photocopy of an article appearing in The Clarion Ledger as published on February 16, 1984, The Clarion Ledger being a newspaper published in Jackson, Mississippi and the front page of same containing an article entitled "Court Awards $8 Million Dollars to Crash Victims' Heirs", wherein said newspaper article stated that Mr. Brad Lemon was shocked at the amount of the damages the jury awarded and that Mr. and Mrs. Lemon as guardians of the persons of the minor children, had mixed feelings about the damages award. That affiant would state and show unto the Court that said newspaper article would reflect that even the guardians of the persons of the minor children were shocked at the excessiveness of the jury award.

/s/ Roy C. Williams
ROY C. WILLIAMS

Subscribed and sworn to before me this — day of February, A.D., 1984.

_____

Notary Public, State at Large

My Commission Expires: _____

COURT AWARDS $8 MILLION TO CRASH VICTIMS' HEIRS

By Tom Brennan
Clarion-Ledger Staff Writer

PASCAGOULA—A Jackson County Circuit Court jury returned the largest punitive damage award in the history of the state Tuesday when it granted $8 million to the four children of an Ocean Springs doctor and his wife who died in a fiery airplane crash outside Warsaw, Poland, in March 1980.

The heirs of Dr. and Mrs. Ray L. Wesson were awarded $8,087,136 after the panel deliberated for about two hours, climaxing a 13-day trial. The jurors found the defendant Mutual Life Insurance Company of New York (MONY) negligent in failing to pay the Wessons' insurance to their heirs.

"Naturally we were pleased with the jury's verdict," said Paul S. Minor, who represented the Wesson children along with Clyde H. Gunn III. "It obviously indicated the strong feelings of the people of Jackson County that they are not going to tolerate this type of conduct by insurance companies."

Jackson attorney Natie Caraway, who represented MONY, said his client was "absolutely going to appeal" the jury's damage award.

The Wessons were among 87 people who died when a Polish LOT airliner crashed into a 19th century fortress outside Warsaw. Wesson was serving as team physician for a U.S. amateur boxing team scheduled for a series of bouts with the Polish National team. Also killed in the crash were 14 boxers and six other people attending to the team.

At the time of their death, Wesson and wife Delores Ann had an $87,136 life insurance policy with MONY. The Wesson children, Roy Jr., 19, Allison, 17, Dave, 15,

and Jason, 11, sought to collect the face amount of the policy, but the company denied it was liable because no premiums were paid on the policy.

When MONY balked at honoring the policy, the children, through their guardians, Brad and Nancy Lemons of Ocean Springs, filed suit in Circuit Court claiming the policy contained a provision by which premiums would be paid automatically from the cash value of the policy.

Lemons said he was shocked at the amount of damages the jury awarded.

"I had no idea it would be that large. I had hoped for maybe half that amount," he said.

Lemons said he and his wife had mixed feelings about the damage award.

"I worry about anyone starting out with that much money. It might ruin them for life. But these are a good bunch of young'uns and are level-headed," he said. Ironically, it was his children who brought Wesson into boxing. He said before his death that he only became interested in the sport because his children liked to watch boxing matches.

Wesson served as chief physician for the Biloxi Boxing Club for nine years and held the same post for two AAU National Championships.

The jury also awarded Jackson insurance broker W.A. Wimberly and Corporate Planning Ltd., the agent and firm that sold the Wessons the policy, $350,000 for MONY's failure to defend them in the suit. They were represented by attorney Charles R. Davis of Jackson.

Wesson was chief of staff at Howard Memorial Hospital in Biloxi at the time of his death.

No. 87-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON AND JASON MANNING WESSON, MINORS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

---

BRIEF IN OPPOSITION

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May 10, 1988

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves an award of punitive damages against petitioner, Mutual Life Insurance Company of New York (Petitioner or "MONY"), on the basis of a jury finding that petitioner acted in bad faith in making a calculated decision to deny full payment on a life insurance policy. The policy covered Dr. Lamar Wesson, a prominent Mississippi physician who was killed with his wife in a plane crash while accompanying the United States Amateur Boxing Team to Poland in 1980. After the crash, respondent (who was the administratrix and guardian of the beneficiaries of the life insurance policy —the four Wesson children, age 8 to 15) sought recovery

on the policy. Petitioner refused to pay on the ground that the policy had lapsed as a result of nonpayment of one premium. The policy, however, contained an "automatic premium loan" ("APL") provision that prevented lapse of the policy in the event of nonpayment. Utilizing intentionally falsified computer records that showed no APL on the Wesson policy, and ignoring the plain language of the policy itself, petitioner repeatedly refused to pay. Respondent brought suit on behalf of the children for the face value of the policy and for punitive damages. At trial, petitioner conceded liability for the face value of the policy. The jury returned a verdict for respondent for the face value of the policy and also for $8 million punitive damages. As a result of facts uncovered during the case, thousands of petitioner's life insurance policies were found to have been falsely entered into computer records as lacking APL even though those policies did have APL provisions.

The Mississippi Supreme Court affirmed the jury finding of liability and the award of punitive damages, conditioned upon respondent's acceptance of a remittitur in the sum of $6.5 million, which reduced the punitive damage award to $1.5 million. The court decided upon the remittitur after applying established state law standards to determine whether the award was appropriate. Mississippi law requires consideration of whether the amount of punitive damages is (a) necessary as punishment; (b) necessary to deter similar conduct by others; and (c) proportionate to the defendant's ability to pay. *Mutual Life Insurance Company of New York v. Wesson*, 517 So.2d 521, 532 (Miss. 1987), *reprinted in* Appendix to Petition for Certiorari ("*Appendix*") at 1a, 20a.

The opinion of the Mississippi Supreme Court sets forth in great detail all pertinent facts of this case, and respondent incorporates all of the state court findings by reference. However, because petitioner's statement of the case bears almost no resemblance to the facts found by

the Mississippi courts, respondent is obliged to correct the serious misimpressions created by that statement:

First, petitioner's attempt to portray its refusal to pay the face amount of Dr. Wesson's life insurance policy as simple negligence is foreclosed by the jury instructions, the jury findings, and the record evidence. Under an instruction proposed by *petitioner*, and given by the court, the jury found that petitioner's conduct was not "merely negligent," but was "so grossly negligent and reckless as to be the same as an intentional denial." [1] The majority of the Mississippi Supreme Court concluded that "MONY's contention that it is guilty only of simple negligence is overwhelmingly rebutted" by the evidence. *Appendix* 12a. For example, the majority found that petitioner's action in not entering the APL provision into its computer record of Dr. Wesson's policy was "intentional" and was "in accordance with [petitioner's] policies and procedures." *Appendix* 12a.[2] The majority also found that implementation of this corporate "policy" of deleting APL even when APL had been requested "was not an isolated incident, but, rather, included a large number of policies." *Appendix* 12a. The three judges who dissented from the majority's decision to order a remittitur thought MONY's conduct was sufficiently reprehensible to warrant the full award. *Appendix* 37a. They expressed "agreement with the majority in finding MONY's conduct and practices *intentional* and detrimental, not only to the plaintiffs here involved but to other policyholders as well and that it warranted an award of punitive damages."

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[1] That instruction is reproduced in note 15, *infra*.

[2] An employee of petitioner testified that although she knew the application for the policy requested APL, she gave "instructions that Dr. Wesson's policy be issued without APL," because "she was aware of MONY's *policy* regarding APL . . . ." *Appendix* 4a (emphasis added).

Appendix 35a (emphasis added).[3] Thus, every member of the Mississippi Supreme Court agreed that petitioner "had no arguable, legitimate or justifiable reason to deny the claim . . . ." *Appendix* 16a; *id.*, 12a.

Second, petitioner's attempt to portray this as "an ERISA case" by assuming the applicability of the Employee Retirement Income Security Act ("ERISA") misrepresents the nature of the proceedings in the trial court. Petitioner is seeking to transform this into an ERISA case so it can claim that ERISA's preemption provision, 29 U.S.C. § 1144(a), precludes any award of punitive damages. But petitioner never raised any ERISA issue at trial. The record thus contains no evidence, jury instructions, or jury findings with respect to whether Dr. Wesson's life inurance policy was an "employee benefit" under an ERISA plan. As petitioner acknowledges in a footnote, none of the material cited in petitioner's statement of the case to support its claim that this is an ERISA case was ever received in evidence at trial. *Petition* at 3 n.1. Petitioner thus has no basis in the record for its claim that "[t]he is an ERISA case." *Petition* at 5.

SUMMARY OF ARGUMENT

Petitioner asks this Court to resolve three federal constitutional questions respecting the award of punitive damages in this case. Petitioner argues that the punitive damage award: (*i*) violates the Excessive Fines Clause of the Eighth Amendment because it is allegedly disproportionate to petitioner's conduct and to criminal fines for analogous conduct; (*ii*) violates the Due Process Clause of the Fourteenth Amendment because it was imposed without criminal procedural protections; and (*iii*) is preempted by ERISA. *None* of these federal questions

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[3] No member of the court dissented from the conclusion that the evidence justified an award of punitive damages. Justice Robertson said he "would assent" to that conclusion; he dissented only because, in his view, the award was preempted by ERISA. *Appendix* 34a.

was properly presented to the Mississippi courts. Consequently, the Mississippi courts did not pass on any of them. Petitioner's failure properly to raise these questions in the state courts has resulted in a record devoid of evidence, jury instructions or findings of fact essential to resolution of those questions. As a result of petitioner's procedural defaults, this Court is without authority to review the federal questions presented in the petition. (Point I).

In any event, the questions presented in the petition do not raise any substantial issue of federal law that warrants this Court's review. The decision below is not even alleged to conflict with any other decision of a state court of last resort or of a federal court of appeals. It is not inconsistent with any decision of this Court, and it does not present any important question of federal law that should be decided by this Court in the context of this case. (Point II).

ARGUMENT

I. PETITIONER'S FEDERAL CONSTITUTIONAL CHALLENGES TO THE PUNITIVE DAMAGE AWARD WERE NOT PROPERLY PRESENTED TO THE MISSISSIPPI COURTS, WERE NOT DECIDED BY THE MISSISSIPPI COURTS, AND SHOULD NOT BE CONSIDERED BY THIS COURT.

This Court does not have statutory authority to review the state court judgment at issue here unless the petitioner "specially set up or claimed" a "title, right, privilege or immunity" under federal law *in the state court proceedings.* 28 U.S.C. § 1257(3).[4] The requirement that a federal question be properly presented in the state

[4] The Court can also review state court judgments in which a federal or state statute has been "drawn into question on the ground of its being repugnant to the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1257(3), but petitioner never drew into question the validity of any state or federal statute.

court proceedings ensures development of the necessary factual record for just and proper resolution of the federal question, furthers a strong interest in federalism and comity by respecting the authority and competence of state courts to adjudicate federal claims in the first instance, and precludes unnecessary constitutional adjudication by giving the state court the opportunity to resolve the case on an adequate and independent state ground. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). *See also Illinois v. Gates*, 462 U.S. 213, 218-222 (1983).

None of the three federal constitutional bases on which petitioner challenges the award of punitive damages in this case was "specially set up or claimed" in a proper manner in the state court proceedings. Petitioner's Fourteenth Amendment Due Process claim was never raised at any stage in the state proceedings. Its Eighth Amendment Excessive Fines claim and its ERISA preemption claim under the Supremecy Clause, U.S. Const., Art. 6, were not raised in the proper and timely manner provided under Mississippi law—indeed, neither claim was even mentioned until after petitioner had filed its briefs in the Mississippi Supreme Court. For this reason the Mississippi Supreme Court declined to address the Excessive Fines and ERISA claims. Petitioner's procedural defaults in the state court proceedings preclude the exercise of certiorari jurisdiction under 28 U.S.C. § 1257(3), constitute an adequate and independent state ground for the judgment below, and foreclose all possibility of meaningful review of those federal constitutional questions in this Court. For these reasons, the petition for certiorari should be denied.

A. Petitioner Never Raised A Due Process Objection To The Award Of Punitive Damages At Any Stage In The State Court Proceedings.

In case after case, this Court had made clear that it is without authority to "decide federal constitutional issues raised here for the first time." *Cardinale v. Louisiana*,

394 U.S. 437, 438 (1969). *Accord Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983); *Webb v. Webb*, 451 U.S. 493, 499 (1981). This principle forecloses consideration of petitioner's Due Process claim.

Petitioner now argues that the state court proceedings violated the Due Process Clause of the Fourteenth Amendment because punitive damages were assessed "absent some or all of the same procedural rights as are enjoyed by defendants in criminal cases." *Petition* at (*i*). But petitioner has not "specif[ied] the stage in the proceedings, both in the first instance and in the appellate court," at which its Due Process claim was raised, as required by S. Ct. Rule 21(h), because that claim was never raised at any stage. Even if that Due Process issue were substantial on the merits—and it is not, *see* Point II.A *infra*—petitioner's failure to present it in any form at any stage below precludes this Court from exercising its certiorari jurisdiction to decide the issue now.

Petitioner acknowledges that it failed to raise the Due Process issue below, but seeks to paper over this otherwise dispositive defect by arguing in a footnote that its Due Process argument is a "mere enlargement" of a claim it allegedly raised under the Excessive Fines Clause of the Eighth Amendment. *Petition* at 11 n.3. This argument must fail for three reasons:

First, in no reasonable sense can petitioner's Excessive Fines claim be said to encompass the Due Process claim petitioner seeks to raise in this Court. The Excessive Fines claim arises under the Eighth Amendment and challenges the punitive damage award on the substantive ground that "it is disproportionate to actual damages and vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous allegedly criminal business activities." *Petition* at (*i*) (Questions Presented). The Due Process claim arises directly under the Fourteenth Amendment and challenges the punitive

damage award on the procedural ground that it was imposed "absent some or all of the same procedural protections as are enjoyed by defendants in criminal cases." *Id.* These claims are entirely distinct. An award of punitive damages could be imposed under procedures that provided civil defendants all the procedural protections afforded to criminal defendants, and yet be disproportionate to both actual damages and criminal penalties for analogous business behavior. Conversely, an award of punitive damages could be proportionate to both actual damages and analogous criminal penalties and yet have been imposed under a procedure that lacked all the procedural protections petitioner demands in its Due Process claim. The Eighth Amendment Excessive Fines claim seeks a *substantive* constitutional limit on the amount of punitive damages available to civil plaintiffs, whereas the Fourteenth Amendment Due Process claim seeks criminal *procedural* protections when a civil plaintiff seeks punitive damages.

Second, no precedent supports the expansive jurisdictional interpretation petitioner urges. To the contrary, this Court has made clear—in the very case petitioner invokes to support its argument—that a federal question not raised in the state court will be considered a "mere enlargement" only if it is "necessarily connected" to a question properly raised below "so that the state court could not have given judgment [on the question that was raised] without deciding it." *Dewey v. Des Moines*, 173 U.S. 193, 198-199 (1899). As respondent has demonstrated, petitioner's Due Process claim is wholly unconnected to its Excessive Fines claim. The Mississippi courts could readily have determined whether the Excessive Fines Clause of the Eighth Amendment imposes substantive limits on the size of punitive damage awards without resolving the distinct issue whether the Fourteenth Amendment Due Process Clause requires criminal procedural protections in cases where civil plaintiffs seek punitive damages.

Dewey stands for no more than the proposition that a petitioner is not prevented from urging additional arguments, not presented below, in support of a federal claim that *was* properly presented below. *Id.* at 198 ("Parties are not confined here to the same *arguments* which were advanced in the courts below *upon a Federal question there discussed*") (emphasis added); *see also Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring). Indeed, in *Dewey* a petitioner who had "raised only one Federal" Due Process question in the state courts was not permitted to raise a related but distinct federal Due Process question in this Court because the related question had not been presented to the state court. 173 U.S. at 198, 198-200. Petitioner's Due Process claim in the present case cannot reasonably be understood as simply another strain of argument in support of its Excessive Fines claim. It is instead a wholly distinct claim, based on a wholly distinct provision of the Constitution, that cannot be considered a "mere enlargment" of the Excessive Fines claim.

Third, as respondent will demonstrate in Point I.B. *infra*, the Excessive Fines Clause question itself was not properly raised or decided in the Mississippi courts, and therefore suffers from fatal jurisdictional flaws that preclude this Court from considering that question as well. Thus, even if the Due Process claim were a mere enlargement of the Excessive Fines claim—and it is not—the Excessive Fines claim cannot serve as the means for petitioner to evade the prerequisites of section 1257(3) with respect to the Due Process claim. If the Court is precluded from hearing the Excessive Fines claim, it cannot have jurisdiction over a "mere enlargement" of that claim.

The sound jurisdictional purposes undergirding the limitations on the scope of this Court's certiorari jurisdiction would be thwarted by review of the Due Process issue in this case. The Mississippi Courts have had no

opportunity to consider petitioner's claim that criminal procedural protections must attach when a civil plaintiff seeks punitive damages. Indeed, even in its petition, petitioner specifies neither the respect in which the state court procedures in this case fell short nor the additional procedural protections petitioner believes the Constitution demands. Thus, this Court lacks the benefit of any considered treatment of the issue by the courts most familiar with both the facts of this case and the nature of Mississippi procedures. Additionally, the Mississippi Supreme Court has had no opportunity to decide whether additional procedures might be required as a matter of state law, thus obviating federal constitutional adjudication by this Court. *See Illinois v. Gates*, 462 U.S. at 222 (presentation of federal issue first to state court "permits a state court . . . to rest its decision on an adequate and independent state ground"); *cf. Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Accordingly, this Court should decline to consider petitioner's Due Process question.

B. Petitioner Failed To Raise An Excessive Fines Clause Challenge To The Punitive Damage Award At The Proper Stage In The State Court Proceedings. For That Reason, The Mississippi Supreme Court Declined To Consider The Excessive Fines Clause Claim, And This Court Should Not Consider That Claim Now.

The petition also challenges the size of the punitive damage award in this case on the ground that it violates the Eighth Amendment's prohibition of excessive fines. But petitioner did not raise that issue at any appropriate stage of the state proceedings. Petitioner did not rely on the Excessive Fines Clause in its answer or amended answers. Nor did petitioner request or object to jury instructions on that ground. Even after the jury awarded punitive damages, petitioner failed to raise *any* constitutional issue in its comprehensive motion for judgment

notwithstanding the verdict, which assigned 48 separate errors. Nor did petitioner raise any Eighth Amendment claim in its assignments of error to the Mississippi Supreme Court, which, under then-Rule 6 of the Mississippi Supreme Court Rules, had to be filed on or about February 12, 1985. Petitioner belatedly attempted to raise an Excessive Fines claim for the first time in a motion to amend its assignment of errors. That motion was filed on November 13, 1986, only six days before oral argument in the Mississippi Supreme Court, and approximately eighteen months after briefs had been filed with that court. *Appendix* 113a.

Petitioner's last-minute effort to revise its earlier tactical judgments or oversights was untimely under well-established and consistently followed rules of the Mississippi Supreme Court. *See Estate of Briscoe v. Briscoe*, 255 So.2d 313, 314 (Miss. 1971); *Mississippi State Highway Comm'n v. Rives*, 271 So.2d 75, 79 (Miss. 1973). As petitioner admits, the Mississippi Supreme Court denied petitioner's motion on the ground of inexcusable untimeliness and declined to consider the Excessive Fines claim. *Petition* at 12-13. This explicit finding of untimeliness is an adequate and independent state ground that bars review by this Court. It has long been established that for this Court to have jurisdiction to review a state court decision, "the essential federal question must have been especially set up there at the proper time and in the proper manner." *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919). Where a state supreme court decides, in accord with the consistent practice of that State, that an issue is untimely, that constitutes an adequate state ground for resolving the issue, and this Court lacks jurisdiction. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182-183 n.3 (1983).

With respect to the Excessive Fines Clause issue, the present case is similar to *Allstate Ins. Co. v. Hawkins*, No. 87-40, a case in which a petition for certiorari was

recently denied by this Court. 100 S.Ct. 212 (1987). In *Hawkins*, the petitioner sought to raise an Excessive Fines Clause claim virtually identical to the claim petitioner seeks to raise in this case. In *Hawkins*, as in the present case, the petitioner had failed to raise and preserve its Excessive Fines claim in a proper and timely manner in the state court proceedings. Identical considerations warrant a denial of certiorari in the present case.

C. Petitioner's Claim That ERISA Preempts An Award Of Punitive Damages Under Mississippi's Law Of Bad Faith Was Not Properly Presented To The Mississippi Courts, Was Not Considered By The Courts Below, And Should Not Be Considered By This Court.

Petitioner now contends that ERISA preempts Mississippi's law of bad faith punitive damages as applied in this case. *Petition* at 5-11. But petitioner failed to raise the affirmative defense of ERISA preemption at any appropriate point during the proceedings below. Petitioner did not rely upon ERISA preemption in its answer or amended answers, even though Rule 8 of the Mississippi Rules of Civil Procedure requires that affirmative defenses be asserted in an answer. Nor did petitioner request or object to jury instructions on that ground. Even after the jury awarded both compensatory and punitive damages, petitioner did not rely on ERISA preemption in its motion for judgment notwithstanding the verdict. Nor did petitioner raise any ERISA preemption claim in its assignment of errors to the Mississippi Supreme Court, or even in briefs and oral argument to that court. Petitioner made only one effort to discuss this issue, in a belated letter (which petitioner now characterizes as a "letter brief"—*see Petition* at 10) to the Mississippi Supreme Court six months *after* oral argument in that court. That attempt was untimely and procedurally inadequate because the Mississippi Supreme Court Rule

applicable at the time, Rule 28, provided that a party seeking to brief or raise a new issue after oral argument must first obtain "leave of court" to do so, and petitioner never filed a motion requesting such leave.[5] The Mississippi Supreme Court specifically declined to address petitioner's ERISA argument because petitioner had failed to raise the argument in a timely and appropriate manner at trial and on appeal. *Appendix* 13a, n.3.

Petitioner's failure to "specially set up or claim" the federal law ERISA defense in a proper manner in the state courts, as required by section 1257(3), precludes review of the ERISA preemption issue by this Court. Indeed, the present case is squarely controlled by *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983). In *Exxon*, as here, petitioner argued that federal legislation preempted a state law. Because the petitioner had failed to raise the preemption issue in the trial court, and the state supreme court had as a result declined to rule on the issue, this Court refused to consider the issue on certiorari. *Id.* at 182-183 n.3. And in *Exxon*, as here, the petitioner's failure to follow state procedures constituted a procedural default that amounted to an adequate and independent state ground supporting the state court's refusal to consider the preemption claim.

In *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court made clear that a federal question must be properly presented in the state courts in part because questions not raised in state court proceedings "are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."

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[5] This Court has also required that federal questions be presented to the state courts in pleadings and motions. For that reason "[b]riefs and oral arguments before state courts . . . cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Commission*, 269 U.S. 354, 357-58 (1926); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934)." Stern, Gressman & Shapiro, SUPREME COURT PRACTICE 157 (6th ed. 1986).

Id. at 439. Petitioner's effort to obtain review of an ERISA preemption issue in this case suffers from precisely the deficiencies identified in *Cardinale*. On the merits, the preemption issue is completely dependent on complex and unresolved factual questions respecting the applicability of ERISA to the life insurance policy at issue in this case. Because petitioner failed to raise any ERISA defense in the trial court, the record lacks necessary evidence and at least three factual findings crucial to the determination whether ERISA would preempt the particular award of punitive damages in this case:

First, as petitioner admits, *see Petition* at 3 n.1, petitioner did not introduce into evidence the 1974 employee pension plan under which the life insurance policy at issue in this case was allegedly purchased. Petitioner acknowledges that the policy at issue was purchased in 1974, two years *before* the employee pension plan was allegedly amended "to conform to" ERISA. *Petition* at 2-3. That concession alone strongly suggests that the policy at issue was not purchased, and could not have been purchased, as part of an ERISA plan. Furthermore, the 1976 employee pension plan petitioner has included in the *Appendix* at 74a was also not introduced into evidence. *See Petition* at 3, n.1. Thus, the record contains no finding, and it is not possible to determine, whether the language in the 1976 plan specifying the limited conditions under which the plan could purchase a life insurance policy as an employee benefit, was contained in the 1974 plan under which Dr. Wesson's life insurance policy was allegedly purchased.[6]

Second, the language of the 1976 plan reproduced in petitioner's appendix indicates that the insurance policy at issue in this case *could not* have been purchased pur-

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[6] At trial, petitioner made passing reference to the 1976 plan, but only in order to establish an agency relationship between Dr. Wesson and another individual. Petitioner made no effort at trial to demonstrate that ERISA governed the plan.

suant to the terms and conditions of that plan. Article IX of the 1976 plan authorizes the purchase of life insurance for employees *only* if the insurance policy contains "an annuity option [to] . . . provide . . . retirement income benefits," *Appendix* at 110a, but the policy at issue in this case (which petitioner did not include in the *Appendix*) contains no such annuity option.

Third, because petitioner's fraudulent deletion of the APL provision from its computer, which triggered the chain of events that inexorably resulted in denial of the claim, occurred before January 1, 1975, the effective date for ERISA's preemption provision, 29 U.S.C. § 1144(b)(1), the trial court never had the opportunity to determine whether ERISA preempted respondent's state law claim for damages flowing directly from this initial act by petitioner.

Petitioner seeks to evade the consequences of its failure properly to raise the ERISA issue in the Mississippi Courts by arguing that this Court's interpretation of ERISA in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ——, 95 L.Ed.2d 39 (1987), was a supervening "change of law" binding upon the Mississippi Supreme Court. *Petition* at 9. This argument is frivolous. Had petitioner properly presented the ERISA defense to the trial court, properly preserved the defense in its assignments of error, and properly presented the defense on appeal, then the Mississippi Supreme Court would arguably have been bound to apply the holding of *Pilot Life* if indeed ERISA applied to the facts in this case—a finding that cannot be made on this record. But the Mississippi Supreme Court in no sense ignored the merits of this Court's *Pilot Life* decision. Rather, the court declined to consider the preemption issue because petitioner had waived the ERISA defense by failing to raise it at any appropriate stage in the state court proceedings. Thus, petitioner's claim that the Mississippi Supreme Court refused to follow *Pilot Life* solely on the ground that the

case had already been "submitted," *Petition* at 8, grossly mischaracterizes the holding below.[7] The ERISA preemption issue was not considered because petitioner had failed to raise it at any appropriate stage of the proceedings.[8]

In arguing that *Pilot Life* amounted to a supervening "change of law," petitioner appears to suggest *sub silentio* that it should be relieved of the consequences of its failure properly to raise the ERISA defense in the state courts because it should not be held to have anticipated *Pilot Life*. That argument is also meritless. ERISA was adopted in 1974, ten years before the 1984 trial in this case. Petitioner, the thirteenth largest insurance company in the world, with thirty-five in-house lawyers, R. 1414, must have been aware of ERISA and its explicit preemption provision. *Pilot Life* did not set forth a new judge-made rule of preemption, and did not "change" or expand the scope of that statutory preemption provision. Nor did *Pilot Life* overturn or revise any previous judicial interpretation of the scope of ERISA preemption. *Pilot Life* was simply the first occasion for this Court to *apply* the preemption provision Congress

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[7] The full holding on this point was as follows:

> "The question of what effect, if any, the Employee Retirement Income Security Act of 1974 (ERISA) . . . as interpreted by Pilot Life Ins. Co. v. Dedeaux, —— U.S. ——, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), has upon this claim is not addressed, since it was not raised in the lower court or in the appellate briefs and argument. (NOTE that *Pilot* was decided after this case was submitted)."

Appendix at 13a, n.3 (statutory citation omitted).

[8] The two cases petitioner cites in support of its argument—*Bell v. Maryland*, 378 U.S. 226 (1964), and *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941)—are inapposite. In both *Bell* and *Vandenbark*, this Court took cognizance of supervening law with respect to issues that had been properly presented and decided on the merits in the lower courts and were thus properly before this Court.

had adopted in 1974. Thus, at all relevant times during the litigation below, petitioner had available all the knowledge it needed to raise the affirmative defense of ERISA preemption, and had no reason to assume that an ERISA preemption defense was foreclosed. Indeed, the defendant in the virtually contemporaneous *Pilot Life* case properly raised ERISA preemption in the trial court as an affirmative defense to a "bad faith" punitive damages claim under Mississippi law. As this Court has held in a closely analogous context, "[w]here the basis of a . . . claim is available, and other defense counsel have perceived and litigated the claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as" a reason for excusing a waiver of state procedural requirements. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). To accept the argument that the intervening decision in *Pilot Life* should excuse petitioner's failure to raise the ERISA defense at the time and in the manner prescribed by state law would be to accord no significance to the ERISA statute itself. *Pilot Life* therefore does not excuse petitioner's waiver of the ERISA preemption defense.

In a recent Fifth Circuit decision indistinguishable from the present case, the Court of Appeals held that an insurance company defendant waived the ERISA preemption defense by not raising it in the trial court. *Dueringer v. General American Life Ins. Co.*, —— F.2d —— (No. 86-4929, 5th Cir., April 15, 1988). In *Dueringer*, as here, a plaintiff had been awarded punitive damages under Mississippi law in an insurance dispute. On appeal, the insurance company argued that the award was preempted, and relied on this Court's decision in *Pilot Life*, which had been rendered after trial but before the appeal was considered. The court ruled that the insurance company had waived the ERISA preemption defense by not raising it at trial. Holding that ERISA preemption "must be raised as an affirmative defense," the court concluded that the appellant had "neg-

lected this legal defense too long to raise the issue first on appeal." —— F.2d at ——. That this Court had not decided *Pilot Life* before the trial provided no excuse, the Fifth Circuit determined, for failing to raise that defense at trial.

Finally, petitioner's curious claim that the Mississippi Supreme Court's decision not to consider the ERISA issue is "tantamount" to ignoring a valid subject matter jurisdiction objection, *Petition* at 10, is entirely without merit.[9] The ERISA preemption defense is *not* one of "those preemption claims that go to the state's actual adjudicatory or regulatory power as opposed to the state's substantive laws." *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, —— (1986). Rather, ERISA preemption, as every Court of Appeals to consider the issue has held, is an affirmative defense that, if properly pled and proved, preempts only the state's substantive laws and not its adjudicatory powers. If a defendant waives the affirmative defense of ERISA preemption, a court has subject matter jurisdiction to adjudicate the merits of the plaintiff's state law claims. *Dueringer v. General American Life Ins. Co.*, *supra*; *Johnson v. Armored Transport of California, Inc.*, 818 F.2d 1041, 1043-1044 (9th Cir. 1987); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986). That is precisely what happened in the present case.

Accordingly, petitioner's ERISA claim cannot appropriately be considered by this Court.

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[9] In Respondent's Opposition to Petitioner's unsuccessful application to this Court for a stay, respondent pointed out that ERISA explicitly vests concurrent jurisdiction in state and federal courts to decide ERISA issues. 29 U.S.C. § 1132(e)(1). Respondent's Opposition to Application For Stay at 7, n.2. Accordingly, it is frivolous to argue that ERISA deprives state courts of subject matter jurisdiction. Petitioner apparently agrees, and is therefore forced to argue that the effect of ERISA is "tantamount" to depriving state courts of subject matter jurisdiction.

II. PETITIONER HAS PRESENTED NO SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW BY THIS COURT.

Respondent has demonstrated that none of the questions presented in the petition for certiorari may properly be considered by this Court because none of those questions was properly presented to, or decided by, the courts of Mississippi. However, even if this Court were to find that it could properly consider these questions, the particular federal questions raised in the petition do not warrant review under the criteria set forth in Supreme Court Rule 17. The Mississippi Supreme Court has not decided any question of federal law in this case in a way in conflict with the decision of another state court of last resort, a decision of a federal court of appeals, or a decision of this Court. Nor has the Mississippi Supreme Court decided an important question of federal law that has not been, but should be, decided by this Court in the context of this case. *See* S. Ct. Rule 17.1(b) & (c).

A. Petitioner's Claim That Punitive Damages Can Only Be Imposed If Constitutional Safeguards Available In Criminal Trials Have Been Provided Does Not Warrant Review.

Petitioner's suggestion that the constitutional protections afforded criminal defendants must be afforded to defendants in civil cases before punitive damages can be awarded has been uniformly rejected by the lower courts.[10] Furthermore, even if petitioner's claim did raise

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[10] *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984) (holding double jeopardy clause inapplicable to punitive damage award to private litigant because the determination in such a proceeding "does not carry with it the consequences" necessary for a proceeding to be deemed "essentially criminal," the defendant would "not suffer the stigma normally accompanying criminal proceedings," and "this is not an action brought by the state, but one brought by a private individual"), *cert. denied*, 470 U.S. 1051 (1985); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987) (rejecting defendant's

substantial constitutional questions, it would be inappropriate to review those questions in the posture they are presented here. Instead of arguing that it was denied

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contention that imposition of punitive damage award without safeguards present in criminal proceedings was a denial of due process, because punitive damage action was civil rather than criminal in nature), *petition for certiorari pending*, 56 U.S.L.W. 3175; *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986) (rejecting claim that punitive damage award violated due process because of its allegedly quasi-criminal nature); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337, 1344-45 (1985) (rejecting claim that punitive damage award "constitutes criminal punishment requiring constitutional guarantees," because court could find "no case law supporting these propositions," and award of punitive damages did not involve finding that defendant violated criminal laws, no stigma attached to punitive award, and the action was privately filed and funded); *Peterson v. Superior Court*, 181 Cal. Rptr. 784, 642 P.2d 1305 (Supr. Ct. 1982) (rejecting claim that ex post facto clause was applicable to civil case involving punitive damages, because "[t]he potential punitive damage award in this case is unquestionably a penalty civil in nature. There is no possibility of the stigma of a criminal conviction nor the potential loss of personal freedom."); *Unified School District No. 409 v. Celotex Corp.*, 6 Kan.App.2d 346, 629 P.2d 196, 206 (1981) (holding that imposition of punitive damages did not violate constitutional guarantee of due process or defendant's right to protection against double jeopardy, reasoning that the imposition of punitive damages "does not approach the severity of criminal sanctions and does not demand the same safeguards as do criminal prosecutions"); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.2d 757, 174 Cal. Rptr. 348, 383 (1981) (rejecting claims that ex post facto and double jeopardy prohibitions were applicable to award of punitive damages in civil case); *Gibson v. Gibson*, 15 Cal.App.3d 943, 93 Cal. Rptr. 617, 621 (1971) (rejecting claim that "due process principles regarding incompetent counsel in criminal proceedings should be transported into civil proceedings" involving punitive damages); *People v. Superior Court*, 115 Cal. Rptr. 812, 819 (Supr. Ct. 1974) (availability of punitive damages "does not convert a civil action into a criminal action" and privilege against self-incrimination is inapplicable to that action); *Toole v. Richardson-Merrell Inc.*, 60 Cal. Rptr. 398, 417-18 (Ct. App. 1967) (rejecting claim that imposition of punitive damages in civil case was unconstitutional because defendant received only six preemptory challenges, a unanimous verdict was not required, the vote of nine jurors was allowed to impose a

a particular constitutional right, petitioner asserts that "some or all" of the constitutional rights provided in criminal proceedings must be afforded in civil cases when punitive damages are sought. *Petition* at (*i*) (Questions Presented) This ambiguous blunderbuss claim encompasses an extraordinarily broad range of criminal procedures and rules, including the right against double jeopardy, the right of confrontation, proof beyond a reasonable doubt, trial by jury (and associated rights concerning the size of the jury and the need for a unanimous verdict), the right to effective assistance of counsel, the right to a speedy trial, the right against self-incrimination, and many others.[11]

As this Court has often explained, "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in

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penalty, and defendant was denied the presumption of innocence). *See generally United States v. Ward*, 448 U.S. 242 (1980) (provision in Federal Water Pollution Control Act authorizing penalty payable to government "revolving fund" of up to $5,000 for each violation of Act, which was assessed by considering the size of the business, the effect on the owner's ability to continue in business, and the gravity of the violation, was a civil penalty and Fifth Amendment's protection against self-incrimination was inapplicable); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (expressing doubts that plaintiff in civil action under Racketeer Influenced and Corrupt Organizations Act must prove that predicate criminal offenses for RICO violation were committed "beyond a reasonable doubt" despite availability of treble damages if plaintiff prevailed).

[11] Petitioner is not in a position to question the size of the jury or the use of a preponderance standard of proof because petitioner received a trial before twelve jurors, and Jury Instruction 9a, which embodied a preponderance of the evidence standard, was proposed by *Petitioner*. *See* note 15, *infra*, and Trial Transcript at 2954, Record at 4947. Furthermore, the application of a stricter standard of proof would have made no difference in the present case. The Mississippi Supreme Court specifically found that the evidence supporting the punitive damage award was "overwhelming." *Appendix* at 12a.

which these factors combine must inevitably vary with the dictate involved." *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966); *accord Brown v. Louisiana*, 447 U.S. 323 (1980). For example the Eighth Amendment is clearly inapplicable to punitive damage awards to private litigants, because the historical function of that Amendment has been to afford protection against the *government*.[12] Similarly, this Court has ruled that some of the criminal protections available to individual criminal defendants are "personal" rights and are *not* available to corporate entities.[13] Rather than deciding whether all of these criminal procedures should be imposed *en masse* in civil proceedings in which private litigants seek punitive damages from corporate entities, if this Court decides to review these constitutional issues it should do so in cases where *specific* procedures have been requested and have been at issue, so the Court can carefully consider the history and function of each specific procedure and its applicability to proceedings seeking punitive damages from corporate entities.[14]

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[12] *Ingraham v. Wright*, 430 U.S. 651 (1977). *Cf. Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 430-31 (1967) ("Of the many policies which authorities have suggested as underlying the privilege against self-incrimination, several reflect a common fear of abuse of government power through the criminal process.").

[13] Petitioner's claim assumes, for example, that a *corporate entity* can invoke the right of an individual criminal defendant not to incriminate himself. This Court has ruled to the contrary. *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974); *cf. Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission*, 85 Pa. Comm. 1, 480 A.2d 1317 (1984) (holding that Cruel and Unusual Punishment Clause does not protect corporations); *see generally First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79, n.14 (1977) ("certain 'purely personal' [constitutional] guarantees . . . are unavailable to corporations").

[14] Although the question presented in the petition claims that punitive damages may not be imposed absent procedural protections afforded criminal defendants, in passing petitioner raises in the

B. Petitioner's Claim That The Punitive Damage Award Violated The Excessive Fines Clause Of The Eighth Amendment Does Not Warrant Review.

Because the Excessive Fines claim has been raised in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765, and has been extensively briefed in that case, respondent here will only briefly state the reasons why there is no urgent reason to review that claim in the context of this case.

First, petitioner's Eighth Amendment claim is directly contrary to this Court's prior decisions that the Eighth Amendment is inapplicable to civil proceedings. *Ingraham v. Wright*, 430 US 651 (1977) (reasoning that Eighth Amendment was intended to protect those "convicted of crimes" and to limit the power of *government* to fine or punish for its own benefit); *see* Appellee's Brief in *Bankers Life* at 27-28.

Second, petitioner's claim has been uniformly rejected by the lower courts. *See Hart-Anderson v. Hauck*, Civ. No. 85-498 (Mont. March 17, 1987); *Downey Savings and Loan Ass'n v. Ohio Casualty Insurance Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987), *petition for certiorari pending*, 56 U.S.L.W. 3175; *Palmer v. A.H. Robins*, 684 P.2d 187, 217 (Colo. 1984) (en banc); *Unified School District No. 490 v. Celotex Corporation*, 6 Kan. App. 2d

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body of the petition the quite different argument that the standards under which the jury was instructed to impose punitive damages were insufficiently certain to pass constitutional muster. This argument should not be reviewed by this Court for several reasons. *First*, the argument is not properly before the Court. Petitioner has never presented any Due Process question at any stage in the state proceedings, and this particular Due Process question is not fairly encompassed in the different Due Process question presented in the Petition. *See* Point I.A. *supra*. Second, on the merits this alternative Due Process claim does not present a substantial federal question. Although the Due Process clause does require that a state law provide clear standards with respect to the "conduct it prohibits," *Giacco v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) (cited in

346, 629 P.2d 196, 206 (1981); *Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693, 695 (N.D. Ga. 1980); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132, 144 (1976).

Third, this Court's decision in *Ingraham*, and the unanimous body of lower court decisions, are so clearly supported by the common law and colonial history of the Eighth Amendment that there is no need for reexamination of this issue. Appellee's Brief in *Banker's Life* at 30-35. And see in that case the brief of *amici* Consumers Union of U.S., Consumer Federation of America and National Consumer League at 6-40.

Fourth, even if the Excessive Fines Clause did impose a substantive limit on the size of punitive damage awards to plaintiffs in civil litigation, an award would only be "excessive" if it was not proportional to the gravity of petitioner's offense or if it deprived petitioner of its means of livelihood. Appellee's Brief in *Banker's Life* at 37-41. Because those common law tests are satisfied in this case, particularly after the substantial remittitur, acceptance of petitioner's argument would not dictate a different result in this case. In this regard, it should be emphasized that petitioner's constitutional objections are directed at punitive damages awarded pursuant to a jury instruction that *petitioner itself proposed. See* Record at

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Petition at 16), there can be no serious issue in this case concerning the clarity of the substantive conduct rules applicable to petitioner. The law has always recognized a wide latitude in prescribing remedies and punishments, including punitive damages, so they will be appropriate to the substantive conduct that gives rise to them. As has been demonstrated in appellee's post-argument brief in *Bankers Life v. Crenshaw, supra*, the Due Process Clause does not require definite, inflexible standards governing the imposition of punitive damages, so long as the substantive conduct rules provide a defendant with a sufficiently clear understanding of what conduct is and is not prohibited. Finally, in this case, petitioner was held liable for punitive damages on the basis of a jury instruction that petitioner itself proposed. *See* note 15, *infra* and accompanying text. Under these circumstances, review by this Court would be wholly inappropriate.

4947-4951 and Jury Instruction 9a.[15] Petitioner cannot plausibly mount a constitutional challenge to the very legal standard petitioner successfully urged the trial court to adopt.

Finally, petitioner has failed to address its Eighth Amendment arguments to the punitive damage award actually imposed in this case—the $1.5 million award after remittitur. Petitioner had ample opportunity to challenge the excessiveness of that greatly reduced award in a petition for rehearing to the Mississippi Supreme Court, but chose not to do so.

C. Petitioner's ERISA Preemption Claim Does Not Warrant Review.

Nor has petitioner presented any reason why this Court should exercise its discretionary authority to review the ERISA preemption issue that petitioner claims this case presents. On the merits, even assuming the record would support a just resolution of the ERISA preemption issue, the petition does no more than restate the precise issue this Court resolved last Term in *Pilot Life*; the question on the merits in this case, as in *Pilot Life*, is whether

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[15] Jury instruction 9a reads, in relevant part, as follows:

> The Court instructs the jury that you may not award punitive damages to the plaintiff in this case for actions of the defendant, The Mutual Life Insurance Company of New York, which are *merely negligent*. Instead, in order to justify an award of punitive damages to the Plaintiff, you must find from a *preponderance of the evidence* that The Mutual Life Insurance Company of New York's actions in denying the claim on the policy on question were so grossly negligent and reckless as to be *the same as an intentional denial*. In other words, before you may award punitive damages to the plaintiff you must find from a preponderance of the evidence in this case that the actions of The Mutual Life Insurance Company of New York in denying the claim contained an element of aggression, malice and insult, or were grossly negligent, or evidenced a reckless disregard for the rights of the Plaintiff.

Record 05149 (emphasis added).

ERISA preempts Mississippi's common law of punitive damages for bad faith conduct in insurance disputes *if* the insurance was a benefit of an employee benefit plan within ERISA's coverage. There is no reason for this Court to revisit the merits of that question after so brief an interlude.

Because the question presented is not worthy of certiorari on the merits, petitioner has urged this Court to grant review because the action of the Mississippi Supreme Court allegedly "strikes at the very core of this Court's constitutional mandate to determine, and insure compliance with, the law of the land." *Petition* at 10. The petition's implication that the courts of Mississippi are willfully flouting this Court's authority is disingenuous. As respondent has demonstrated, *see* Point I.C. *supra*, the Mississippi Supreme Court declined to consider the applicability of *Pilot Life* because petitioner had waived the affirmative defense of ERISA preemption by failing to raise it at trial and on appeal at an appropriate time and in an appropriate manner. The decision of the Mississippi Supreme Court in this case does not contain the slightest suggestion that the court would refuse to follow *Pilot Life* in a case in which a defendant had properly preserved a defense of ERISA preemption.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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May 10, 1988

No. 87-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON AND JASON MANNING WESSON, MINORS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Respondent submits this supplemental brief pursuant to Rule 22.6 of the Rules of this Court to call attention to a new case and other intervening matter not available at the time of filing of respondent's Brief in Opposition. In particular, respondent will address the applicability of this Court's recent decision in *Banker's Life & Casualty Co. v. Crenshaw*, No 85-1765, decided May 16, 1988, (Point I), and the contentions raised in the brief *amicus curiae* filed on May 10, 1988 by the American Council of Life Insurance, (Point II).

ARGUMENT

I. THIS COURT'S DECISION IN *BANKERS LIFE & CASUALTY CO. v. CRENSHAW* MANDATES THAT CERTIORARI BE DENIED IN THE PRESENT CASE.

This case involves three constitutional challenges—grounded in the Excessive Fines Clause of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Supremacy Clause of Article VI—to an award of punitive damages under Mississippi law for bad faith refusal to pay an insurance claim. Respondent has demonstrated that this Court should not exercise its certiorari jurisdiction under 28 U.S.C. § 1257(3) to review these constitutional issues because they were not "specially set up or claimed" in a proper manner at a proper time in the Mississippi Courts. *See* Brief in Opposition at 5-18.[1]

Bankers Life & Casualty Co. v. Crenshaw mandates denial of the petition for certiorari in this case for the reasons set forth in the Brief in Opposition. Recognizing that constitutional challenges to civil punitive damage awards raise "question[s] of some moment and difficulty," this Court made clear in *Crenshaw* that the requirement of proper presentation of federal questions in the state court, and the jurisprudential policies underlying that requirement, "apply with special force" in cases seeking review of these questions. Slip Op. at 7. *See also*

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[1] Petitioner never raised any due process challenge to the punitive damage award at any stage in the state proceedings. Petitioner's Eighth Amendment and ERISA preemption claims were not raised in the proper and timely manner under Mississippi law—indeed, neither claim was even mentioned until after petitioner had filed its briefs in the Mississippi Supreme Court. Furthermore, petitioner never sought to raise these issues in a petition for rehearing to the Mississippi Supreme Court. As a result, the Mississippi Supreme Court has not ruled on any of the issues petitioner asks this Court to review.

id. at 1, 4 (O'Connor, J., concurring in part and concurring in the judgment). The Court emphasized that in the context of challenges to state-authorized punitive damage awards, there are "strong reasons to adhere scrupulously to the customary limitations" on review under section 1257(3):

> "Our review now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that, the Mississippi state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent nonfederal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits."

Id. at 7-8. *Accord Illinois v. Gates*, 426 U.S. 213, 224 (1983).[2]

All of the jurisdictional and prudential considerations that led this Court to decline review of the constitutional issues in *Crenshaw* apply equally in this case. As in *Crenshaw*, the petitioner here sought to raise in this Court several constitutional challenges to an award of punitive damages in a bad faith insurance case under Mississippi law arising in the Mississippi courts. As in *Crenshaw*, the petitioner here failed to raise any of those constitutional challenges in a proper manner at a proper time in the courts of Mississippi.

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[2] On the same day it decided *Crenshaw*, this Court also dismissed the appeal in *Alabama Power Co. v. Capps*, No. 87-1597, which raised similar due process and Eighth Amendment issues.

Neither "comity to the States" nor "the constellation of practical considerations, chief among which is [the] need for a properly developed record," Slip Op. at 7, would be served by granting the petition in this case. Because petitioner failed to raise its Due Process claim at all in the state court, and raised its Excessive Fines and ERISA preemption claims in an incomplete, untimely, and improper manner, the courts of Mississippi have had no opportunity to either adjudicate the merits of these issues or provide an adequate and independent state ground of decision that would obviate the need for review by this Court. And, as respondent has demonstrated, petitioner's procedural defaults have precluded development of a factual record sufficient to decide those federal questions. *See, e.g.*, Brief in Opposition at 13-15.

Petitioner is on even weaker ground in urging review than was the appellant in *Crenshaw*. In *Crenshaw*, the appellant had at least attempted, albeit inadequately, to raise some form of constitutional challenge to the punitive damage award in a petition for rehearing. In *Crenshaw*, this Court suggested that review might have been appropriate had the appellant raised its constitutional claims with sufficient specificity in that petition for rehearing. Slip Op. at 5 (citing *Hathorn v. Lavorn*, 457 U.S. 255, 262-265 (1982)). In the present case, however, petitioner chose not to utilize that method of raising issues in the Mississippi Supreme Court, and did not seek review of its federal constitutional claims (or of any other claim) in a petition for rehearing. Accordingly, there is even less justification for finding the requisite "proper presentation" here than there was in *Crenshaw*.

II. THE BRIEF *AMICUS CURIAE* OF THE AMERICAN COUNCIL OF LIFE INSURANCE FAILS TO ADDRESS FUNDAMENTAL JURISDICTIONAL DEFECTS IN THE PETITION FOR CERTIORARI, MISCONSTRUES THE SUBSTANTIVE ISSUES PRESENTED IN THIS CASE, AND OFFERS NO SOUND REASON FOR GRANTING A WRIT OF CERTIORARI.

The brief *amicus curiae* of the American Council of Life Insurance in support of the petition for certiorari raises several interesting issues of federal constitutional law. This case, however, does not present most of the issues *amicus* would like this Court to address. In any event, petitioner's procedural defaults preclude this Court's consideration of *all* of the federal constitutional issues discussed in the *amicus* brief. *Amicus* has not even attempted to suggest why this Court should exercise its jurisdiction under 28 U.S.C. § 1257(3) notwithstanding the obvious jurisdictional flaws in the petition. Nor, in light of *Crenshaw*, can *amicus* plausibly do so.

1. *The ERISA preemption claim.* *Amicus* repeatedly seeks to characterize the ERISA preemption issue in this case as a question of the retroactivity *vel non* of this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. —, 95 L. Ed. 2d 39 (1987). At page 8 of its brief, for example, *amicus* contends that "[i]n denying effect to *Pilot Life* with respect to outstanding decisions, [the court below] permits claimants with pending appeals to circumvent ERISA." *See also Amicus* Brief at 2 (suggesting that court below held that "lower courts will apply *Pilot Life* only to facts arising after that decision was rendered"); *id.* at 6-7 (discussing principles of retroactivity). This argument seriously misconstrues the ERISA preemption issue in this case.

The Mississippi Supreme Court did not hold that *Pilot Life* should not be given retroactive application to cases pending on direct appeal. The court's opinion does not

contain one word about retroactivity, and does not even remotely suggest that *Pilot Life* would not be followed in cases on appeal in which the defendant had properly raised and preserved an ERISA preemption defense in the trial court. To the contrary, as the face of the court's opinion makes plain, and as respondent demonstrated in its Brief in Opposition at 12-18, the Mississippi Supreme Court declined to consider the applicability of *Pilot Life* to this case because petitioner waived the affirmative defense of ERISA preemption by failing to raise it at the proper time and in the proper manner in the trial court, in its assignments of error, or in its briefs on appeal. There is no reason to think that, had petitioner properly raised and preserved the defense of ERISA preemption, the Mississippi Supreme Court would have failed to give effect to *Pilot Life*. The retroactivity argument is thus no more than an effort to "circumvent" the consequences of petitioner's failure to follow the procedural requirements of Mississippi law.

Indeed, the argument *amicus* offers in support of retroactive application of *Pilot Life* unintentionally (but dramatically) confirms that petitioner had no reasonable excuse for failing to raise the defense of ERISA preemption in a proper and timely manner. As *amicus* makes plain, *Pilot Life* did no more than "reaffirm[] . . . the preemptive breadth of ERISA." *Amicus* Brief at 7. It did not overrule any prior decision of this Court or invalidate a previously unquestioned practice. *Id.* at 8. To the contrary, *Pilot Life* was clearly "foreshadowed" in prior decisions of this Court and in ERISA itself. *Id.* at 7 (citing cases). Even before *Pilot Life*, as *amicus* notes, "several lower federal courts had concluded that ERISA preempts state common law claims, like those asserted here." *Id.* In light of the impressive evidence *amicus* has marshalled, it cannot plausibly be argued that petitioner should be relieved of the failure to raise an ERISA preemption defense on the ground that *Pilot Life* was not foreseeable.

2. *The Due Process and Excessive Fines Claims.* *Amicus* also urges review of the punitive damage award in this case based on a host of challenges grounded in the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. Many of these issues have never been raised in this case, even in the petition for certiorari, and thus are wholly inappropriate for review. For example, *amicus* argues that the substantive standard applied in the decision below to determine *liability* for punitive damages is constitutionally deficient because this standard allegedly permitted imposition of punitive damages without a finding of "intentional culpability." *Amicus* Brief at 14. The petition raises no such challenge to the judgment below, and with good reason. As respondent has demonstrated, the substantive standard applied by the jury in this case —contained in a jury instruction proposed *by petitioner*— required a finding that petitioner's conduct was "so grossly negligent and reckless as to be the same as an intentional denial." *See* Brief in Opposition at 3, 24-25 & n.15.[3]

In any event, review by this Court is precluded because neither this nor any other Due Process or Excessive Fines claim raised in the *amicus* brief was properly raised or decided in the state court. For example, *amicus* urges that the award of punitive damages violated the Due Process Clause because "the courts below failed to accord" criminal procedural protections to petitioner in the trial court proceedings. But, again, as respondent has

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[3] Furthermore, this Court has ruled that in *federal* cases arising under 42 U.S.C. § 1983, punitive damages can be awarded without any finding of intentional misconduct. *Smith v. Wade*, 461 U.S. 30 (1983). *Amicus* is thus urging the Court to rule that the Due Process clause requires a higher standard for imposing liability for punitive damages in *state* courts than this Court has found appropriate for imposing liability for punitive damages in federal courts. Not surprisingly, petitioner has not made that claim, and *amicus* has cited no authority in support of that claim.

shown, petitioner never *requested* any such protections in the trial court, and the Courts of Mississippi have never had the opportunity to decide, under state law or under federal law, whether and to what extent additional procedural protections might be required in cases involving possible punitive damage awards. Under these circumstances, review by this Court of the Due Process and Excessive Fines claims would be wholly inappropriate.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in respondent's Brief in Opposition, the petition for certiorari should be denied.

Respectfully submitted,

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No. 87-1684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON and JASON MANNING WESSON, MINORS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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REPLY BRIEF FOR PETITIONER

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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REPLY BRIEF FOR PETITIONER

This case presents the unresolved questions of the propriety of the Mississippi Supreme Court's failure to apply preemptive federal legislation and to pass upon federal constitutional defenses in reliance upon irregularly applied state procedural rules.

STATEMENT OF THE CASE

Respondent, in its Statement of the Case, has ignored two critical facts. First, MONY has admitted that it coded Dr. Wesson's policy so that it would not have an

operative Automatic Premium Loan provision ("APL"). The coding, however, was done to benefit Dr. Wesson and his partner to preserve the tax-qualified status of the policy. App. at 71a. MONY's personnel relied on Endorsement No. 64540 to the policy to negate the operation of the APL, and they advised Dr. Wesson's agent that no APL was provided. App. at 5a. MONY's conduct, therefore, was consistent with its policies and procedures and with the desire to preserve the tax-qualified status of the policy. App. at 4a.

Second, prior to the commencement of the lawsuit MONY's claims personnel were not aware that the APL was operative as they relied on computer records showing no APL. The Mississippi Supreme Court recognized that Dr. Wesson and his partner had in 1978 and 1979 obtained loans to cure prior defaults in premium payments and did not rely upon the APL at that time. App. at 8a, n. 2. Absent from the Mississippi Supreme Court's opinion is any reference to Respondent demanding payment in reliance upon the APL. No reference exists, as Respondent never made a demand under the APL, opting to sue instead. After the lawsuit was commenced, MONY (not Respondent) determined that the APL applied and immediately tendered payment. App. at 9a.

SUMMARY OF ARGUMENT

Substantial issues of federal law are presented for this Court's review. MONY did not waive its right to assert the ERISA preemption defense, as the defense is not simply an affirmative defense which can be waived by failure to plead in a trial court (Point I).

On May 16, 1988, this Court decided *Bankers Life & Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (U.S. May 16, 1988). This Court held that it was inappropriate to rule on the constitutionality of the award of punitive damages, where appellant had failed properly to raise the defense in the state court. In this case, MONY

specifically raised its Excessive Fines Clause challenge (U.S. Const. amend. VIII) to the award of punitive damages by a motion to amend the assignment of errors on November 13, 1986. App. at 116a. Accordingly, this Court is presented with a proper record for consideration of the constitutionality of the punitive damage award (Point II).

I. MONY TIMELY RAISED ITS ERISA PREEMPTION DEFENSE AS ESTABLISHED BY *PILOT LIFE*

Respondent attempts to label MONY's presentation of the ERISA preemption defense as untimely. Respondent treats the ERISA preemption defense as a simple affirmative defense, which is waived unless asserted in the trial court. Respondent argues that this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987), was a result that could have been anticipated by MONY and that the very arguments made by *Pilot Life* should have been made by MONY.

The issue whether state law "bad faith" claims for punitive damages are preempted by ERISA was not resolved until the holding of *Pilot Life*. As Justices Brennan and Marshall stated in a concurring opinion in a case decided the same day as *Pilot Life*, "before today's decision in *Pilot Life*, the answer to the question whether ERISA preempted state claims of the sort at issue here was not obvious." *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1548 n. (1987). Given the sweeping nature of the ERISA legislation, and the lack of a dispositive interpretation of the preemption issue prior to *Pilot Life*, MONY cannot be held to have waived the defense.

Subsequent to the Court's decision in *Pilot Life*, MONY timely brought this interpretation of the governing law to the attention of the Mississippi Supreme Court. As the case below had already been argued and submitted, MONY was constrained to advise the court by letter

brief. The court's refusal to consider MONY's preemption defense based upon *Pilot Life*, as described in a footnote to the court's opinion, can fairly be read to have been supported, at least in part, on the fortuitous fact that *Pilot Life* was decided after this case was submitted.

To hold that ERISA preemption, as established by *Pilot Life*, constitutes a waivable affirmative defense ignores the "extraordinary" application of ERISA § 502(a), 29 U.S.C. § 1132(a) (1982). In *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542 (1987), this Court held that state court actions based upon claims preempted by ERISA and involving § 502(a) are removable to federal court under federal question jurisdiction. The Court found in the legislative history of ERISA a clear intent by Congress to single out for special treatment claims preempted by ERISA under § 502(a). *Id.* at 1547. The preemptive force of ERISA in such cases was held to be extraordinarily powerful so as actually to convert state common law claims into purely federal questions. *Id.*

ERISA preemption claims must be treated as far more than affirmative defenses. Mere affirmative defenses may be considered waived by the operation of procedural rules governing the time within which they must be asserted. Such a result occurred in *Dueringer v. General American Life Insurance Co.*, 842 F.2d 127 (5th Cir. 1988), and is inconsistent with this Court's treatment of the ERISA preemption doctrine in *Taylor*. Where a rule of law, however, establishes that certain claims are purely and exclusively federal in character, state rules cannot operate to vitiate such defenses as the states no longer have the power to apply state law in such cases. MONY had an absolute right to have its preemption claim considered and issues in the case decided in accordance with ERISA.

II. THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO ENTERTAIN MONY'S EXCESSIVE FINES CLAUSE ARGUMENT RESTED UPON A PROCEDURAL RULE THAT IT APPLIES ONLY IRREGULARLY

Since the Petition was filed in this action, the Court decided *Bankers Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (U.S. May 16, 1988). In *Crenshaw* the Court held that a federal question is not properly presented to the highest court of a state on a motion for rehearing where it consists merely of a "vague appeal to constitutional principles." *Id.* at 4420. The Court reaffirmed its holding in *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982), in which it accepted certiorari jurisdiction of claims that were raised for the first time, but not passed upon, in the Mississippi Supreme Court on petition for rehearing, but held in *Crenshaw* that *Hathorn* was inapposite because appellant had not adequately raised its claims on rehearing. *Id.* The principles enunciated in *Hathorn* and *Crenshaw* establish that the Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) (1966) over MONY's claim that the punitive damage award violated the Eighth Amendment's proscription against excessive fines.

In its motion to amend its assignment of errors to the Mississippi Supreme Court, MONY asserted that:

> The jury's award of punitive damages of $8,000,000 violates the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States and the Excessive Fines Clause of Section 28 of the Mississippi Constitution of 1890.
>
> Further, the Appellant seeks leave to present arguments (in a supplement to its Brief, not to exceed two pages) to this Court in support of this additional assignment of error.

App. at 117a. There is, therefore, no doubt from the record that "a claim under a Federal statute or the

Federal Constitution was presented in the state court[]." *Bankers Life & Casualty Co. v. Crenshaw*, 56 U.S.L.W. at 4420, quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981). MONY's motion was denied at oral argument on the ground that it did not present its Excessive Fines Clause challenge to the trial court.

The issue before the Court, therefore, is whether the refusal of the Mississippi Supreme Court to pass upon the Excessive Fines Clause challenge is an adequate and independent state ground barring review in this Court. Where the procedural rule that precluded consideration of the federal question below is not "strictly or regularly" followed, there is no adequate and independent state ground barring review. *Hathorn v. Lovorn*, 457 U.S. at 262-63 (1982).[1]

In *Crenshaw*, the appellant raised its federal constitutional challenges for the first time in a motion for rehearing before the Mississippi Supreme Court. This Court noted that if the federal constitutional challenges had been adequately stated, *Hathorn* would have controlled and presumably the Court would have granted certiorari to review the questions presented. *Bankers Life & Casualty Co. v. Crenshaw*, 56 U.S.L.W. at 4420. MONY's specific presentation of the federal constitutional question to the Mississippi Supreme Court by moving to amend its assignment of errors prior to submission of the appeal satisfies the deficiency the Court found in *Crenshaw*.[2] *Hathorn* controls as this action also in-

[1] Respondent fails to distinguish or otherwise address *Hathorn* and instead, relies on cases involving the timely assertion of federal issues in jurisdictions other than Mississippi. (*Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (Alabama Supreme Court); *Allstate Ins. Co. v. Hawkins*, 108 S. Ct. 212 (1987) (Arizona Supreme Court).

[2] If MONY had raised the Excessive Fines Clause challenge for the first time in a motion for a rehearing the Court undoubtedly would have jurisdiction to review the federal question. *Bankers*

volves the Mississippi court's practice of irregularly denying parties leave to raise issues for the first time on appeal. The Mississippi court's failure to decide the federal issue by invoking a procedural rule that it does not apply evenhandedly does not constitute an adequate and independent state ground barring this Court's jurisdiction. *Hathorn v. Lovorn*, 457 U.S. at 263.

CONCLUSION

For the foregoing reasons, as well as the grounds advanced in the Petition and by the *amicus curiae*, a Writ of Certiorari should issue to review the opinion of the Mississippi Supreme Court.

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Life & Casualty Co. v. Crenshaw, 56 U.S.L.W. at 4420. The Mississippi Supreme Court, nevertheless, undoubtedly would not have passed upon the federal question for the same reason it did not allow MONY leave to raise the challenge by amending its assignment of errors.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF AMICUS CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987)—holding that the Employee Retirement Income Security Act of 1974 ("ERISA") preempts state common law actions based upon alleged improper processing of claims for benefits under an ERISA-regulated employee benefit plan—should be applied to factual situations arising before the decision was announced.

2. Whether the decision of the Supreme Court of Mississippi upholding a $1.5 million punitive damage award against Mutual Life Insurance Company of New York ("MONY") on an insurance claim of $87,136 violates the Due Process Clause.

3. Whether the decision of the Supreme Court of Mississippi upholding massive punitive damages imposes an excessive fine in violation of the Eighth Amendment.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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BRIEF AMICUS CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Council of Life Insurance ("Council"), as amicus curiae, in support of the petition for certiorari.

INTEREST OF THE AMICUS[1]

The Council is the largest life insurance trade association in the United States, representing the interests of

[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

635 member life insurance companies. The impact of the decision below on the many members of the Council who issue insurance policies to and administer employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, is substantial. The Supreme Court of Mississippi declined to apply this Court's unanimous holding in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987) ("*Pilot Life*"), that ERISA's civil enforcement provisions preempt common law actions against an insurer for alleged improper processing of a benefit claim under an ERISA-regulated plan, even though it was advised of *Pilot Life* before rendering the decision below. By subjecting members who insure and administer ERISA plans to the uncertainty that lower courts will apply *Pilot Life* only to facts arising after that decision was rendered, the decision below enlarges the risk of insurers to the varying, and often inconsistent, standards of conduct imposed by state common law rules.

The opinion below is important to members of the Council for yet another reason: it creates the possibility that the nonpayment of an insurance claim under an ERISA plan may be accompanied by an unpredictable and very substantial punitive award. It allows claimants under ERISA plans to circumvent ERISA's carefully-crafted enforcement scheme, merely because ERISA preemption issues were not raised in the trial court, and obtain awards of punitive damages under state common law in such cases. Faced with large and unpredictable punitive awards, members of the Council may be unable to provide affordable insurance policies to employers who voluntarily establish ERISA plans. The Council thus has a direct and immediate interest in the issues presented here.

STATEMENT [2]

On February 1, 1974, Petitioner Mutual Life Insurance Company of New York ("MONY") issued a whole-life insurance policy to the Surgical Clinic of Biloxi, P.A. Pension Plan ("Plan") on the life of Dr. Ray Lamar Wesson. The Plan is an employee benefit plan governed by ERISA.[3]

On March 14, 1980, Dr. Wesson died. Shortly thereafter, Dr. Wesson's children, the beneficiaries of the policy, filed a claim with MONY. On June 2, 1980, MONY advised the beneficiaries that the policy, which had a face value of $87,136, had lapsed to a reduced paid-up value of $3,687 because two premiums were unpaid and the policy had no Automatic Premium Loan ("APL") provision. In denying the claim, MONY relied on its computer records which erroneously indicated that the policy had no APL provision.

The Proceedings Below

Respondent, Estate of Ray Lamar Wesson, M.D., *et al.* ("the Wesson Estate"), instituted this suit in Jackson County Circuit Court on August 30, 1982. It sought $87,136 in compensatory damages and unspecified punitive damages for MONY's alleged bad faith refusal to pay the policy claim. Shortly after the Wesson Estate filed suit, MONY discovered the operative effect of the APL provision. It promptly admitted liability and offered to pay $87,136, plus interest, to the policy's beneficiaries. The beneficiaries declined MONY's offer.

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[2] This brief omits references to the reports of the opinions below, a statement of the grounds of jurisdiction, and a recitation of the statutes and constitutional provisions involved, in view of the statements in Petitioner's brief on these subjects.

[3] Although adopted prior to the enactment of ERISA, the Plan was amended in 1976 to ensure compliance with ERISA.

At trial, the only questions before the jury were whether and in what amount punitive damages should be awarded.[4] The jury awarded the Wesson Estate $87,136 in compensatory damages and $8 million in punitive damages. The jury did so after hearing evidence that, in 1982, MONY had total assets of $8.7 billion and a net worth of $447.9 million. *See* 517 So. 2d at 539. On appeal, the Mississippi Supreme Court affirmed the judgment on the condition—which the Wesson Estate accepted—of a remittitur of the punitive damages award in the amount of $6.5 million.

As to the issue of liability for punitive damages, the court below acknowledged Mississippi precedents that an insurer's demonstration of an "arguable reason" for denying coverage generally precludes submission of a punitive damages claim to the jury. *See, e.g., Weems v. American Security Insurance Co.*, 486 So. 2d 1222 (Miss. 1986); *Standard Life Insurance Co. v. Veal*, 354 So. 2d 239 (Miss. 1977). The court below then applied its substantive test for awarding punitive damages in bad faith cases, which requires proof "by a preponderance of evidence either (1) that the insurer acted with malice, or (2) that the insurer acted with gross negligence or reckless disregard for the rights of others." 517 So. 2d at 528 (quoting *Aetna Casualty & Surety Company v. Day*, 487 So. 2d 830, 832 (Miss. 1986)). Despite MONY's contention that its unilateral error constituted only simple negligence and provided an "arguable reason" for denying the Wesson Estate's claim, the court below nevertheless sustained the trial court's decision to submit the punitive damages claim to the jury. It found that "it cannot be contended seriously that MONY had an *arguable reason or a legitimate reason or a justifiable reason* (all three amount to the same) for denying the Wesson death claim." *Id.* (emphasis added).

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[4] MONY had admitted liability and deposited the full policy amount with the registry of the court.

As to the amount of the punitive damages award, four justices concluded, after applying so-called "established standards," that the award was excessive and should be remitted pursuant to Miss. Code Ann. § 11-1-55 (Supp. 1987). 517 So. 2d at 533. Applying the same standards, three justices dissented. They concluded that "[t]his [$8 million] award, although high, is not disproportionate to the transgression involved in this case and the financial ability of the appellant to pay." *Id.* at 540. Despite their acknowledgement that "the jury does not have as clear a guideline by which to determine the amount necessary to adequately punish the wrongdoer, protect the public and deter such future conduct," the dissenting justices declined to engage in "the business of regulating punitive damages." *Id.* at 540-41. They noted that, under the majority's standard, "a defendant, however obstinate and reprehensible his conduct, can victimize others and engage in such conduct with full assurance under this case that his monetary punishment will be much less than 1% of his net worth." *Id.* at 539.[5]

Justice Robertson, in a separate opinion, dissented on the ground that this Court's decision in *Pilot Life* deprived the court of authority to decide the case.

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[5] The $8 million punitive award assessed by the jury represented approximately 1.785% of MONY's net worth in 1982. The court-substituted award of $1.5 million represents approximately .335% of MONY's net worth. *See* 517 So.2d at 539.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF THE PROPER APPLICATION OF *PILOT LIFE INSURANCE CO. V. DEDEAUX* PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW WARRANTING THIS COURT'S REVIEW

In *Pilot Life*, this Court unanimously held that ERISA's exclusive civil enforcement remedies preempt state common law actions based upon the alleged improper processing of a claim for benefits under an insured ERISA plan. Although the instant case presents precisely such a claim, the court below failed to address ERISA's preemption of the Wesson Estate's claim, noting only that the issue was "not raised in the lower court or in the appellate briefs and argument" and that *Pilot Life* was decided after the appeal in this case was "submitted." 517 So. 2d at 529 n.3. Because the decision below raises important issues as to the appropriate application of *Pilot Life*, this Court should grant review.

This Court's decisions generally apply to pending cases. *See Robinson v. Neil*, 409 U.S. 505, 507-08 (1973).[6] The Constitution, however, neither prohibits nor requires the application of new rules retrospectively. *Tehan v. United States*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965). Thus, in deciding the issue of retroactivity, this Court considers "first, whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases

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[6] The issue of the application of decisions to existing facts generally arises in one of four contexts, i.e., application of the decision to: (1) the case in which the rule is announced; (2) cases which are "final," i.e., no longer subject to direct review; (3) cases tried or retried in the future; and (4) cases pending on direct review when the rule is announced. *See* Chamberlin, *United States Supreme Court's Views As To Retroactive Effect Of Its Own Decisions Announcing New Rules*, 65 L.Ed.2d 1219 annot. (1981). This case falls in the last category.

. . .; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question . . .; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases. . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). These considerations point to *Pilot Life*'s application here.[7]

That *Pilot Life*'s reaffirmation of the preemptive breadth of ERISA was "foreshadowed" is plain. Indeed, prior to *Pilot Life*, this Court had consistently recognized that ERISA's "deliberately expansive" (*Pilot Life*, 107 S. Ct. at 1552) preemption provisions were intended to make employee benefit plan regulation a matter of virtually exclusive federal concern. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Moreover, before *Pilot Life*, several lower federal courts had concluded that ERISA preempts state common law claims, like those asserted here, at least insofar as they related to self-funded ERISA plans.[8] Simply

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[7] At least one court has expressly addressed the retroactivity issue presented here, but declined to apply *Pilot Life* in the absence of a ruling by this Court to the contrary. *Ewalt v. Mereen-Johnson Mach. Co.*, 414 N.W.2d 28 (S.D. 1987).

[8] *See Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (ERISA preempts state common law action for alleged mishandling of a benefit claim filed against employer and insurer-administrator of self-funded plan); *Russell v. Massachusetts Mutual life Insurance Co.*, 722 F.2d 482 (9th Cir. 1983) (holding that ERISA preempts state contract and tort law actions arising from an alleged mishandling of a benefit claim), *rev'd on other grounds*, 473 U.S. 134 (1985); *see also Light v. Blue Cross and Blue Shield of Alabama, Inc.*, 616 F. Supp. 558 (S.D. Miss. 1985), *aff'd in relevant part*, 790 F.2d 1247 (5th Cir. 1986); *Justice v. Bankers Trust Co.*, 607 F. Supp. 527 (N.D. Ala. 1985).

put, *Pilot Life* "did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy"; rather, it addressed an important, but unresolved, question of statutory interpretation. *Brown v. Louisiana*, 447 U.S. 323, 335 (1980); *see also Desist v. United States*, 394 U.S. 244, 250-51 (1969); *Stoval v. Denno*, 388 U.S. 293, 300 (1967).

Pilot Life's application to this case, moreover, will further its operation. In enacting ERISA, Congress:

> clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress.

Pilot Life, 107 S. Ct. at 1555. Giving effect to that intent in *Pilot Life*, the Court concluded that ERISA preempted state law claims like those raised in this case. By failing to apply *Pilot Life* here, the decision below frustrates Congress' intent to create, and this Court's enforcement of, a uniform federal scheme of employee benefit plan regulation.

Finally, *Pilot Life*'s retroactive application would hardly produce "substantial inequitable results." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam).[9] In enacting ERISA's "virtually unique preemption provision," *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983), Congress:

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[9] *See also Chevron Oil Co. v. Huson*, 404 U.S. at 108 n.10 (holding that this Court's decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), did not apply retroactively with regard to state statutes of limitations, but was retroactive with regard to state substantive remedies because "[r]etroactive application . . . would not work a comparable hardship or be so inconsistent with the purpose of the [act]").

> careful[ly] balanc[ed] . . . the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Pilot Life, 107 S. Ct. at 1556. The decision below drastically upsets this balance. In denying effect to *Pilot Life* with respect to outstanding cases, it permits claimants with pending appeals to circumvent ERISA and reap the benefit of unwarranted windfalls—in the form of substantial punitive damages—despite the contrary intent of Congress.

To apply *Pilot Life* prospectively only would greatly enlarge the risks of insurers who insure and administer ERISA plans to the varying, and often inconsistent, standards of conduct imposed by state common law rules in cases on appeal. Such a result would only disrupt the uniformity that ERISA was intended to promote. This Court should grant the Petition and resolve this important issue.

II. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE CONSTITUTIONAL INFIRMITIES IN PUNITIVE DAMAGES LAW

This case also presents an important, and frequently recurring, issue of federal constitutional law: whether the open-ended assessment of punitive damages by juries and the courts is so standardless and unfair as to violate due process.[10] The burgeoning development of modern puni-

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[10] The issues whether punitive damages violate due process and the Excessive Fines Clause of the Eighth Amendment have been briefed and argued to this Court in *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *appeal docketed*, 54 U.S.L.W. 3743 (U.S. Apr. 25, 1986), *argued*, 56 U.S.L.W. 3398 (U.S. Nov. 30, 1987) (No. 85-1765).

tive damages law—exemplified by the decision below affirming an $8 million award on condition of remittitur to $1.5 million for failure to pay an $87,136 insurance claim—is at odds with the doctrines of standards and fairness embodied in the Due Process Clause.

Punitive damages are not "a favorite of the law." *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) (citations omitted). Current practices regarding punitive damages are neither time honored nor logically related to traditional legal doctrines. *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-46 (1986). Through decisions such as the one below, punitive damages have been extended far beyond their origin as a means to compensate, in relatively small amounts, victims of insult torts and similar intangible injuries. *See* Nelson, *Punishment for Profit: An Examination of the Punitive Damages Award in Strict Liability*, 18 Forum 377, 380-81 (1983); *Day v. Woodworth*, 13 Howard 363, 371 (1851).[11] Despite a steady growth in the type of injuries, intangible or otherwise, for which courts now provide compensation, punitive damages law has expanded uncontrollably and arbitrarily.[12] Juries, left unguided, have awarded punitive damages against insurance companies

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[11] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, p. 10.

[12] The best known example is the $1 billion punitive damages award recently upheld against Texaco. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 866 (Tex. Ct. App. 1987). Results in product liability and mass tort cases illustrate these trends as well. *See, e.g., Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) ($7.5 million); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986) ($10 million); *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981) ($125 million punitive award remitted to $3.5 million); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984) ($8 million); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) ($6.2 million).

"in a way that could only be called freakish." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).[13] The decision below —with four justices applying "established standards" to arrive at a $1.5 million award and three justices applying the same standards to affirm an $8 million award— provides an appropriate opportunity for this Court to address this haphazard and standardless area of law.[14]

A. The Punitive Damages Award In The Decision Below Is Penal And, As Such, Requires Application Of Procedural Safeguards Available In Criminal Trials

The decision below diverges from the established principle that "punishment cannot be imposed 'without due process of law.'" *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963). The purposes and impact of punitive damages are plainly penal, and, accordingly, constitutional protections akin to those accorded to criminal defendants should be afforded to defendants in punitive damages actions. Because the courts below failed to accord such protections here, this Court should grant review.

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[13] *See, e.g., Hawkins v. Allstate Insurance Co.*, 152 Ariz. 490, 733 P.2d 1073, *cert. denied*, 108 S. Ct. 212 (1987) ($3.5 million punitive award affirmed); *Downey Savings & Loan Ass'n v. Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987) ($5 million punitive award); *T.D.S. Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520 (11th Cir.) ($2.1 million award affirmed), *modified in part*, 769 F.2d 1485 (1985).

[14] That this issue is genuinely ripe for review is exemplified by the fact that the Justice Department, a task force of the American College of Trial Lawyers, and the American Bar Association independently have recommended needed reforms in this troublesome area of the law. *See* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986) at 2 (attributing insurance crisis in part to "the explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as . . . punitive damages"); Report of the Task Force on Litigation Issues of the American College of Trial Lawyers (August 8, 1986); Resolutions of the American Bar Association, approved February 1987.

Though nominally civil, punitive damages are functionally penal. *Cf. United States v. Ward*, 448 U.S. 242, 248-49 (1980) (where penalty is "so punitive either in purpose or effect" as to negate its civil label, it will be treated as penal). Indeed, this Court has so recognized:

> Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to *punish* reprehensible conduct and to *deter* its future occurrence.'

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (emphasis added)). *See also Smith v. Wade*, 461 U.S. at 58 (Rehnquist, J., dissenting); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Punitive damages, as awarded below, promote only the traditional goals of punishment, e.g., retribution and deterrence, which this Court has stated "are not legitimate nonpunitive government objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).[15]

That the award of $8 million on condition of remittitur to $1.5 million on the Wesson Estate's $87,136 in-

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[15] Assessed under the list of considerations stated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69, punitive damages can only be deemed penal. While punitive damages impose no "affirmative disability or restraint," *id.* at 168, they may be imposed upon a showing of "willfulness" or "maliciousness," they are often assessed in amounts greater than criminal sanctions involving similar conduct, and no alternative purposes—other than punishment and deterrence—can rationally be assigned to them. *See* Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987), Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986), Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241 (1985), and Wheeler, *The Constitutional Case for Reforming Punitive Damages*, 69 Va. L. Rev. 269 (1982), for careful analyses of the penal nature of punitive damages.

surance claim was "penal" in a constitutional sense, so as to require enhanced procedural safeguards, is plain. As the court below stated, such an award "is necessary for *punishment of the wrongdoing*" and to "make an example of the defendant so that others may be *deterred* from the commission of similar offenses." 517 So. 2d at 532 (quoting *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d at 278) (emphasis added). Despite its penal character, the punitive award rendered against MONY was accompanied by none of the procedural safeguards mandated by due process. The courts below penalized—and stigmatized—MONY without the protection of a constitutionally-mandated, elevated standard of proof, and without the benefits of more stringent pleading requirements in criminal cases. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *Cole v. Arkansas*, 333 U.S. 196 (1948); *cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (enhanced burden of proof is required by Constitution where proceedings threaten one of the parties with a significant stigma). In addition, unlike criminal defendants who face maximum punishments, MONY's "punishment" was left to the unbridled and unlimited discretion of a jury, with standardless review by the court below. By permitting such punishment to be assessed—without heightened procedural safeguards accorded to criminal defendants—the court below denied MONY constitutionally-required due process.[16]

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[16] A further Due Process Clause concern is raised through the decision below by the fact that punitive damages are taken from MONY and paid not to the government but to a private plaintiff, the Wesson Estate, above and beyond its actual damages. MONY is mulcted by governmental actions in order to give the Wesson Estate a windfall. This is a clear case of an exercise of governmental power "that takes *property* from A. and gives it to B"—which one of the earliest opinions to issue from this Court cited as a paradigm of action beyond legislative power. *Calder v. Bull*, 3 Dallas 386, 388 (1798) (Chase, J.; emphasis in original).

B. The Standards Applied In The Decision Below To Determine Liability For Punitive Damages Are Constitutionally Deficient

That punitive damages actions, as they now exist, fail to comport with even the simplest notion of due process is further evident from the complete lack of intelligible standards for imposing liability for punitive damages—a deficiency starkly illustrated by the decision below. Indeed, although the court below cited one standard—that punitive damages are recoverable only upon proof "by a preponderance of evidence either (1) that the insurer acted with malice, or (2) that the insurer acted with gross negligence or reckless disregard for the rights of others," 517 So. 2d at 528 (quoting *Aetna Casualty & Surety Co. v. Day*, 487 So. 2d at 832)—it also referred to a different test, i.e., whether MONY failed to offer "an 'arguable reason' for denying a claim", *id.* at 527. Because both "standards" are constitutionally deficient, this Court should grant review.

Under the Fifth and Fourteenth Amendments, punishment without culpability is clearly a denial of due process. *See Smith v. Wade*, 461 U.S. at 87-88 (Rehnquist J., dissenting) ("It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm. . ."). But punitive damages—often awarded with no showing of intentional culpability—do precisely that. Indeed, the "standards" for imposing these damages, though never carefully defined, have been perceptibly lowered, permitting courts to award punitive damages against a defendant whose conduct can be characterized, at most, by some heightened degree of negligence. *See* Meyers & Barrus, *Punitive Damages in Product Liability Cases: A Survey*, 52 Ins. Couns. J. 212 (1984); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 34-37 (1982). Moreover, the blurred distinctions between "gross negligence" and "reckless negligence" give judges and juries no real guidance in awarding punitive dam-

ages.[17] As a result, they remain free to "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . [and] to use their discretion selectively to punish expressions of unpopular views. . . ." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 51 n. 14, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.

These difficulties are all too evident in the present case. The court below upheld the jury's punitive award, as remitted to $1.5 million, after finding that MONY had shown no "proper reason" for declining to pay the Wesson Estate's claim and that MONY's contention that it was guilty of "only simple negligence" was "overwhelmingly rebutted." 517 So. 2d at 528. But MONY did offer to pay the full face amount of the policy immediately after it discovered its error.[18] It is not clear what else MONY could have done, or should do in the future, to avoid such punishment, except to pay all claims made promptly and without question.

C. Leaving The Computation Of Punitive Damages To The Standardless Discretion Of The Jury And The Court Fails To Satisfy Due Process And Raises Equal Protection Concerns

The "standards" used for determining the amount of punitive damages to be assessed against MONY are equally deficient and warrant this Court's review. In

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[17] *See* Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 Stan. L. Rev. 281, 297 (1978) ("the distinction between recklesness and negligence relates to no clear behavioral standards in the real world").

[18] In addition, as a precautionary measure, MONY modified its claims evaluation procedure after this suit was filed to require death claims personnel to review both the policy application and the computer printout before denying a claim. *See* 517 So.2d at 527.

contrast to criminal sanctions, punitive damages are generally computed without regard to any statutory or common law maximum, and no rational, intelligible, or workable measure of damages exists. The amounts of punitive damages are left to the unbounded discretion of the jury and the court, guided only by ill-defined factors, including the wealth of the defendant, and "the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50-51; *Smith v. Wade*, 461 U.S. at 56-65, 92-94 (dissenting opinions of Rehnquist and O'Connor, JJ.)

The present case provides a stark example of unbridled jury discretion and confused judicial scrutiny. In penalizing MONY, the jury below was guided by no more definite standards than that its award should serve as punishment and a deterrent and should take into account MONY's wealth. Swayed by evidence that MONY's assets and net worth totaled $8.7 billion and $447.9 million respectively, the jury apparently plucked its $8 million punitive award out of the air. That award bears little, if any, relationship to customary criminal sanctions or to meaningful punishment.

Imposing a massive punitive damages award on the basis of wealth, moreover, raises equal protection concerns. The Fourteenth Amendment's requirement of equality governs all branches of government, *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948), and ensures that states treat equally, and not capriciously, each member of society. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985). That requirement is plainly inconsistent with the notion that a jury may, without other limit or standard, penalize a defendant based on its wealth. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966) (wealth as a means of classification is "traditionally disfavored").

An award of punitive damages based on a differential of wealth bears no rational relationship to the plaintiff's injury or to the defendant's culpability. A higher punitive sanction determined by considering wealth—a standard distinct from the concept of fault—threatens a discriminatory and unjustifiable stigma of iniquity to a wealthier defendant, while benefiting a less wealthy, but equally or more culpable, defendant. Upholding an award that subjects a defendant to different treatment based on wealth also gives a jury unfettered discretion to apply the law invidiously, thereby disintegrating the ideal of equality embodied in the Fourteenth Amendment.

Moreover, an award of punitive damages based on wealth is completely capricious. If there are faults in this case, they were committed by MONY's employees. MONY has no stockholders—it is a mutual company. The burden of any damages which MONY must pay will be borne by its policyholders, either through decreased dividends on their insurance or through increased premiums for future policies. But these policyholders bear no responsibility for the fault. To single them out to bear the burden of a vast punitive damages judgment, simply because MONY is a big company, can hardly be regarded as providing equal protection of the law.

Finally, the standards upon which the court below relied in scrutinizing the jury's punitive award are likewise constitutionally deficient. Faced with the same evidence, four justices invoked the court's remittitur authority to reduce by fivefold the punitive award which they deemed "excessive after applying the established standards", 517 So. 2d at 533; three justices dissented, concluding that "[t]his Court is not authorized to disturb a jury verdict regarding the amount of damages because it 'seems too high, or seems too low.'" *Id.* at 540 (quoting *Toyota Motor Co. v. Sanford*, 375 So. 2d 1036, 1037 (Miss. 1979)). The decision below thus amply exemplifies the

typically random, unpredictable and unprincipled process by which courts review jury awards of punitive damages.[19]

III. THE DECISION BELOW UPHOLDING MASSIVE PUNITIVE DAMAGES VIOLATES THE EIGHTH AMENDMENT

The Eighth Amendment ensures that punishment will not be meted out arbitrarily or in excessive amounts wholly disproportionate to the offense. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), this Court stated that whether the imposition of massive punitive damages "is impermissible under the Excessive Fines Clause of the Eighth Amendment . . . raise[s] important issues which, in an appropriate setting, must be resolved." This case presents such an appropriate setting.

Although this Court has had few occasions to address the Excessive Fines Clause of the Eighth Amendment, it has long recognized the "constitutional principle of proportionality" embodied in the Cruel and Unusual

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[19] Courts have affirmed many awards in their entirety. *See, e.g., Hawkins v. Allstate Insurance Co., supra* (affirming a $3.5 million punitive award). Applying varying standards, other courts have either reversed punitive awards or reduced them. *See, e.g., San Jose Production Credit Ass'n v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (reversing $500,000 punitive award); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 169 Cal. Rptr. 691 (1979), *appeal dismissed*, 445 U.S. 912 (1980) ($5 million punitive award held excessive); *Underwriters Life Insurance Co. v. Cobb*, No. 13-86-456-CV (Tex. Ct. App. 1988) (LEXIS, States library, Tex. file) (affirming $1 million punitive award against insurer for refusal to pay $6,250 claim on condition of a remittitur of $500,000); *Demsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million without explaining any basis for the $1.5 million figure it selected).

Punishments Clause. *Solem v. Helm*, 463 U.S. 277, 286 (1983); *see Weems v. United States*, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for crime should be graduated and proportioned to offense").[20] Given the common origin of the clauses of the Eighth Amendment, the concept of proportionality should be equally applicable to the Excessive Fines Clause. *See generally* Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987); Bittle, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 74 Cal. L. Rev. 1433 (1987). Indeed, as this Court has stated:

> We have recognized that the Eighth Amendment imposes 'parallel limitations' on bail, fines and other punishments, *Ingraham v. Wright*, [430 U.S.] at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception.

Solem v. Helm, 463 U.S. at 289.[21]

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[20] The Eighth Amendment's ban against excessive punishments and its requirement of proportionality derive from the Magna Carta and "the longstanding principle of English law that the punishment . . . should not be . . . greatly *disproportionate* to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959) (emphasis added).

[21] That punitive damages are imposed in cases called civil should not bar the application of the Eighth Amendment to them. Not only are punitive damages functionally penal (as their name clearly indicates), but the Eighth Amendment, unlike some other Bill of Rights guarantees, does not distinguish between civil and criminal punishment. *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147-51 (1986).

The governing principle of proportionality as a protection against arbitrariness and excessiveness in punishment cannot be squared with the award of $1.5 million in punitive damages against MONY for the "offense" of erroneously failing to pay a $87,136 insurance claim. This $1.5 million award—an amount 17 times the Wesson Estate's actual damages—can only be deemed arbitrary and wholly disproportionate to the offense charged.[22] Such misguided punishment should not be upheld under the plain words and purposes of the Eighth Amendment.

CONCLUSION

For the reasons set forth above, and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[22] Consideration of the fines allowed for violation of the Mississippi Insurance Code, which proscribes unfair or deceptive acts or practices in insurance, removes all doubt that the award here was excessive. Section 83-5-49 of the Mississsippi Code provides that a *willful* violation of a cease and desist order proscribing an unfair practice is punishable, at most, by a $1,000 fine. Miss. Code Ann. § 83-5-49.